The Washington Court of Appeals affirmed Bailey's convictions on direct appeal, and the Washington Supreme Court denied review. App. 91a-121a.; *State v. Bailey*, 134 Wash.2d 1016, 958 P.2d 315 (1998) (table). The Washington appellate courts also denied Bailey's collateral challenge to his convictions. App. 66a-90a.

Bailey filed a habeas corpus petition pursuant to 28 U.S.C. § 2254(d). Among his claims, Bailey alleged, "The use of the non-testifying codefendants' statements against Bailey violated his Sixth Amendment right to confrontation." Although Bailey challenged the closing arguments under the Confrontation Clause, he did not allege a violation of his right to due process. The district court granted relief on Bailey's Confrontation Clause claim.[2] App. 6a-27a. The district court found the admission of Youngblood's redacted statement itself did not violate the Confrontation Clause. App. 23a. However, relying on two sentences in *Richardson v. Marsh*, 481 U.S. 200, 211 (1987), the district court concluded the closing arguments violated the Confrontation Clause. App. 23a-26a. The district court recognized the sentences in *Richardson* could be viewed as dicta, but still granted relief. App. 26a. On appeal, the Ninth Circuit affirmed. The majority opinion provided no independent analysis, and adopted the reasoning of the district court to affirm the grant of relief on the Confrontation Clause issue. App. 1a-2a. The court denied a timely petition for rehearing *en banc*. App. 4a.

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[2] The district court also granted relief on an alleged violation of *Brady v. Maryland*, 373 U.S. 83 (1963). App. 7a and 51a-61a. The Ninth Circuit, however, did not reach the *Brady* issue, and affirmed solely on the Confrontation Clause issue. App. 2a.

REASONS FOR GRANTING THE PETITION

The lower federal courts concluded the closing arguments of counsel violated the Confrontation Clause because the arguments linked Bailey to an otherwise properly redacted statement of a non-testifying codefendant. The courts reached this conclusion by relying primarily on two sentences in *Richardson v. Marsh*, 481 U.S. 200, 211 (1987), in which this Court directed the Sixth Circuit to consider in the first instance whether a habeas petitioner was entitled to relief based upon a prosecutor's arguments. This Court, however, has not clearly established the rule applied by the lower federal courts in this case. By applying a rule that is not clearly established federal law, the lower federal courts exceeded the authority granted by 28 U.S.C. § 2254(d).

1. 28 U.S.C. § 2254(d) Bars Relief If The Claim Is Not Based Upon A Holding Of This Court.

A federal court may grant habeas relief only if the state court adjudication of a claim "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). "That statutory phrase refers to the holdings, as opposed to the dicta, of this Court's decisions as of the time of the relevant state-court decision." *Williams v. Taylor*, 529 U.S. 362, 412 (2000). "Constitutional rights are not defined by inferences from opinions which did not address the question at issue." *Texas v. Cobb*, 532 U.S. 162, 169 (2001). Clearly established federal law is defined by the holdings of this Court. *Ramdass v. Angelone*, 530 U.S. 156, 165-66 (2000).

The holdings that qualify as "clearly established federal law" are narrow. The holding of an opinion is limited to the final result of the case as well as the portions of the opinion necessary to that result. *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 67 (1996). A sentence is dicta if it was not essential to the disposition of the contested issues. *Central Green Co. v. United States*, 531 U.S. 425, 431 (2001). An expression by the Court that goes beyond the point actually decided is not a holding. *Humphrey's Executor v. United States*, 295 U.S. 602, 626-27 (1935); *Cohens v. Virginia*, 6 Wheat 264, 399-400, 5. L. Ed. 257 (1821); *see also Rogers v. Tennessee*, 532 U.S. 451, 458-59 (2001).

This Court has noted that courts have at times improperly expanded the Court's holdings for purposes of granting relief under 28 U.S.C. § 2254(d). For example, in *Lockyer v. Andrade*, 538 U.S. 63, 72-73 (2003), the Court determined that the Ninth Circuit had improperly expanded the Court's holdings concerning disproportionate punishment beyond the general legal principle established by the Court's precedents. Similarly, in *Mickens v. Taylor*, 535 U.S. 162, 174 (2002), the Court recognized that the circuit courts have improperly extended the Court's holdings to apply a presumed prejudice rule "'unblinkingly' to 'all kinds of alleged attorney ethical conflicts.'". As in *Lockyer* and *Mickens*, the lower courts in this case exceeded the limited scope of review mandated by 28 U.S.C. § 2254(d) by improperly extending this Court's case law to conclude that closing arguments violate the Confrontation Clause. Because the Court has not clearly established that closing arguments violate the Confrontation Clause, relief is not available.

2. The Court's Holdings Establish That Only The Admission Of Evidence May Violate The Confrontation Clause.

The Court's precedent clearly establishes that it is error to admit a non-testifying codefendant's confession where that statement expressly implicates the defendant. *Bruton v. United States*, 391 U.S. 123 (1968). An instruction that the jury should disregard a confession insofar as the defendant's guilt is not sufficient to prevent an error. *Id.* at 135-36. The *Bruton* rule, however, applies only to statements that "expressly implicate" the defendant. *Richardson v. Marsh*, 481 U.S. 200, 208 (1987).

"[T]he Confrontation Clause is not violated by the admission of a nontestifying codefendant's confession with a proper limiting instruction when, as here, the confession is redacted to eliminate not only the defendant's name, but any reference to his or her existence." *Richardson*, 481 U.S. at 211. Where the statement has been redacted so that it is no longer incriminating on its face, no violation occurs even though the statement may later be linked to the defendant by properly admitted evidence. *Id.* at 208-09. The other circuit courts have consistently applied this rule. *See United States v. Miller*, 995 F.2d 865, 866 (8th Cir.), *cert. denied*, *Patterson v. United States*, 510 U.S. 1018 (1993); *United States v. Alvarrado*, 882 F.2d 645, 652 (2d Cir. 1989), *cert. denied*, 493 U.S. 1071 (1990); *United States v. Strickland*, 935 F.2d 822, 826 (7th Cir.), *cert. denied*, 502 U.S. 917 (1991); *United States v. Logan*, 210 F.3d 820, 822-23 (8th Cir. 2000) (*en banc*); *United States v. Taylor*, 186 F.3d 1332, 1335-37 (11th Cir. 1999); *United States v. Verduzco-Martinez*, 186 F.3d 1208, 1214 (10th Cir. 1999);

United States v. Akinkoye, 185 F.3d 192, 197-98 (4th Cir. 1999). A violation of the Confrontation Clause occurs only where it is obvious that statement was redacted and the redacted term referred to the defendant. *Gray v. Maryland*, 523 U.S. 185, 192-96 (1998).

In this case, the Ninth Circuit adopted the reasoning of the district court. App. 2a. The district court determined that Youngblood's redacted statement did not itself violate Bailey's confrontation rights because the redacted statement eliminated any reference to Bailey. App. 23a. The district court ruled, "the state courts' conclusion that the redacted statement was properly admitted was not an unreasonable application of clearly established federal law." App. 23a. Thus, the admission of Youngblood's redacted statement itself did not entitle Bailey to habeas relief because the state court adjudication of this issue was a reasonable application of clearly established federal law. App. 23a.[3]

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[3] Judge Graber concluded the statement had not been sufficiently redacted because it still referred to a "homeboy" from Youngblood's gang, and other evidence showed that Bailey was the only homeboy from Youngblood's gang involved in the murders. App. 2a-3a. The district court and the majority opinion of the Ninth Circuit correctly refused to adopt Judge Graber's reasoning. App. 2a and 23a: *see also* App. 36a-48a. First, Youngblood used the term 'homeboy" to refer to numerous people, not just Bailey. Second, the fact that other evidence might link Bailey to the term "homeboy" did not violate the Confrontation Clause. Because the statement on its face did not directly implicate Bailey, the state court reasonably determined the statement did not violate the Confrontation Clause. *Richardson*, 481 U.S. at 208-11.

3. The Court Has Not Clearly Established That Closing Arguments Of Counsel May Violate The Confrontation Clause.

Despite recognizing that the redacted statement itself did not violate the Confrontation Clause, the Ninth Circuit adopted the district court's conclusion that the closing arguments of counsel violated Bailey's confrontation rights because the arguments linked the redacted statement to Bailey. App. 2a and 23a-26a. Because this Court has never held that the closing arguments of counsel violate the Confrontation Clause, the lower courts applied a rule that is not clearly established federal law for purposes of 28 U.S.C. § 2254(d).

The Ninth Circuit and the district court cited to *Bruton v. United States*, 391 U.S. 123 (1968), *Richardson v. Marsh*, 481 U.S. 200 (1987) and *Gray v. Maryland*, 523 U.S. 185 (1998) as the clearly established federal law governing Bailey's claim. None of these cases, however, clearly established the rule applied by the lower courts to grant habeas relief. *Bruton* held the admission of a non-testifying codefendant's confession that expressly implicates the defendant violates the Confrontation Clause. *Bruton*, 391 U.S. at 135-36. *Richardson* limited *Bruton* by holding the rule applies only to statements that expressly implicate the defendant. *Richardson*, 481 U.S. at 208-11. *Gray* held the replacement of the defendant's name with a blank space, the word "deleted", or a symbol, falls within *Bruton* because the statement still refers directly to the defendant. *Gray*, 523 U.S. at 192. None of the cases established the rule applied in this case.

The district court specifically relied on two sentences in *Richardson v. Marsh* to grant relief. App. 25a. In *Richardson*, the Court noted the prosecutor's argument sought to undo the limiting instruction, and the Court directed the Sixth Circuit to "consider whether, in light of respondent's failure to object to the prosecutor's comments, the error can serve as the basis for granting a writ of habeas corpus." *Richardson*, 481 U.S. at 211. Although noting this language might be viewed as dicta, the district court nonetheless construed it as a holding. App. 26a. The court concluded that this language clearly established a rule that arguments of counsel can violate the Confrontation Clause. App. 26a.

The language in *Richardson* relied upon by the district court was not a holding; it was merely a direction to the Sixth Circuit to consider an issue that this Court had not yet addressed. *Richardson*, 481 U.S. at 211. In *Richardson*, the state court admitted a codefendant's statement that was redacted to eliminate any reference to Marsh. *Id.* at 203-04. The court instructed the jury not to use the confession against Marsh. *Id.* at 204. During closing argument, the prosecutor linked Marsh to portions of the redacted confession. *Id.* at 205. At the conclusion of closing arguments, the trial judge reminded the jury not to consider the statement against Marsh. *Id.* The Sixth Circuit subsequently granted Marsh's habeas petition. *Id.* at 205-06. The Sixth Circuit determined the redacted confession, in light of the other evidence and the prosecutor's linkage of Marsh to the statement during closing argument, violated the Confrontation Clause. *Id.* at 206. This Court reversed, holding the confession did not violate the Confrontation Clause. *Id.* at 211.

The Court held:

> We hold that the Confrontation Clause is not violated by the admission of a nontestifying codefendant's confession with a proper limiting instruction when, as here, the confession is redacted to eliminate not only the defendant's name, but any reference to his or her existence.

Richardson, 481 U.S. at 211.

The Court held only that the redacted confession did not violate the Confrontation Clause. *Richardson*, 481 U.S. at 211. The Court expressed no opinion on whether the prosecutor's argument urging the jury to use the codefendant's confession against Marsh was a basis for relief. *Id.* The Court directed the Sixth Circuit to determine in the first instance the entirely separate issue of whether the prosecutor's comments constituted a basis for habeas relief. *Id.* The Court did not hold the prosecutor's argument violated the Confrontation Clause, and the Court certainly did not address whether arguments by counsel for a codefendant would violate the Confrontation Clause.

Contrary to the conclusion of the Ninth Circuit, the Confrontation Clause does not guard against improper closing arguments of counsel. "[T]he principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused." *Crawford v. Washington*, 541 U.S. 36, 50 (2004). The Confrontation Clause applies to "witnesses" who "bear testimony" against the accused. *Id.* at 51.

Other circuits have rejected the rule applied by the Ninth Circuit, specifically determining that the Confrontation Clause protects against evidence, not the closing arguments of counsel. In *United States v. Sandini*, 888 F.2d 300, 310 (3rd Cir. 1989), the court rejected the theory that counsel's closing argument could violate the Confrontation Clause under *Bruton* and its progeny. "We have, however, never held that *Bruton* applies when the attorney for a codefendant implicates a defendant during a closing argument and we perceive of no reason to do so because the arguments of counsel simply are not evidence." *Id.* at 310-11. "*Bruton* is directed toward preserving a defendant's right to cross-examination, and thus has nothing to do with arguments of counsel based on their interpretation of the evidence." *Id.* at 311; *see also United States v. Quintero*, 38 F.3d 1317, 1342 (3rd Cir. 1994). Similarly, in *United States v. Solis*, 299 F.3d 420, 442 (5th Cir. 2002), the court found no confrontation violation because the closing argument was not evidence.[4]

The Ninth Circuit, by adopting the district court's reasoning, improperly expanded the holding in *Richardson* beyond the rule actually established by this Court. *Richardson* held only that the admission of a redacted confession did not violate the Confrontation Clause. The Court did not hold that closing arguments of counsel violate the Confrontation Clause. Because this Court has not clearly established the rule applied by the Ninth Circuit and the district court, habeas relief is not available.

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[4] The Due Process Clause protects against improper and egregious closing arguments. *Darden v. Wainwright*, 477 U.S. 168, 181 (1986). Bailey's federal petition did not raise a due process challenge to the closing arguments of counsel.

4. The State Court Adjudication Was A Reasonable Application Of Federal Law.

The law assumes that jurors follow their instructions. *Richardson v. Marsh*, 481 U.S. at 206-07 (citing *Francis v. Franklin*, 471 U.S. 307, 325 n.9 (1985)); *Tennessee v. Street*, 471 U.S. 409, 414-16 (1985). Consequently, the presence of a limiting instruction cures various errors that would ordinarily flow from the use of otherwise inadmissible evidence. *Richardson*, 481 U.S. at 207.

In *Bruton*, the Court recognized a narrow exception to this general rule. *Richardson*, 481 U.S. at 207. Where the court admits a facially incriminating confession of a non-testifying codefendant, a limiting instruction does not cure the error. *Id.* A jury would likely not follow a limiting instruction when the codefendant's confession directly names the defendant. *Id.* The narrow exception to the general rule applies only where the codefendant's confession "expressly implicated" the defendant as an accomplice. *Id.* at 208-11. "[T]he calculus changes when confessions that do not name the defendant are at issue." *Id.* at 211.

The redacted statement did not expressly implicate Bailey. The state trial judge repeatedly instructed the jury not to consider Youngblood's confession against Bailey, and the prosecutor repeatedly reminded the jury of this instruction during closing arguments. Since the redacted confession itself did not implicate Bailey, *Bruton* does not apply and the jury is presumed to follow the court's instruction. In light of these facts, the state courts reasonably determined there was no violation of the Confrontation Clause.

CONCLUSION

For the reasons stated herein the petition should be granted.

RESPECTFULLY SUBMITTED,

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October 2005

United States Court of Appeals,

Ninth Circuit.

Ernest Allen **BAILEY**, Petitioner--Appellee,

v.

Maggie **MILLER-STOUT**, Respondent--Appellant.

Ernest Allen **Bailey**, Petitioner--Appellant,

v.

Maggie **Miller-Stout**, Respondent--Appellee.

Nos. 04-35852, 04-36035.

D.C. Nos. CV-03-05476-RBL, CV-03-05476-RBL.

Argued and Submitted June 13, 2005.

Decided June 17, 2005.

As amended Aug. 19, 2005.

David B. Zuckerman, Esq., Law Office of David B. Zuckerman, Seattle, WA, for Petitioner-Appellee and Petitioner-Appellant.

John Joseph Samson, Esq., AGWA--Office of the Washington Attorney General, Olympia, WA, for Respondent-Appellant and Respondent-Appellee.

Appeals from the United States District Court for the Western District of Washington, Ronald B. Leighton, District Judge, Presiding.

Before PREGERSON, GRABER, and GOULD, Circuit Judges.

MEMORANDUM [FN*]

> FN* This disposition is not appropriate for publication and may not be cited to or by the

> courts of this circuit except as provided by Ninth Circuit Rule 36-3.

The district court granted Petitioner Ernest Allen Bailey's petition for habeas corpus on the grounds that his state court conviction for first-degree murder and conspiracy to commit first-degree murder violated *Bruton v. United States*, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968), and *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). Respondent Maggie Miller-Stout appeals, and Petitioner cross-appeals from the district court's denial of two additional claims. On de novo review, *Dows v. Wood*, 211 F.3d 480, 484 (9th Cir.2000), we affirm on the *Bruton* claim and, because a new trial is required, need not and do not reach any of the other issues.

We apply the very high standard required by 28 U.S.C. § 2254(d); habeas relief is available here only if the state court's adjudication of the claim involved an unreasonable application of clearly established federal law as declared by the Supreme Court. *Bruton*, and *Gray v. Maryland*, 523 U.S. 185, 118 S.Ct. 1151, 140 L.Ed.2d 294 (1998), provide the clearly established federal law. In this case the state court's adjudication involved an unreasonable application of those cases for the reasons given by the district court.

AFFIRMED.

GRABER, Circuit Judge, specially concurring:

I concur because the state court's adjudication involved an unreasonable application of *Gray v. Maryland*, 523 U.S. 185, 118 S.Ct. 1151, 140 L.Ed.2d

294 (1998). *Gray* held that redacted statements of a non-testifying co-defendant that continue to refer to the defendant's existence, but "that replace a proper name with an obvious blank, the word 'delete,' a symbol, or similarly notify the jury that a name has been deleted," violate a defendant's constitutional rights even if an inference is required to determine that the omitted person is the defendant. *Id.* at 195. The use of a nickname is the kind of notification that would violate *Bruton v. United States*, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968). *Gray*, 523 U.S. at 195.

Here, Youngblood said that he had to leave town because his Mansfield "homeboy" ***213** was involved in the murders in Bremerton. The Mansfield Gangster Crips is the name of the gang to which Petitioner belonged, according to the evidence. The other people about whom there was testimony concerning the commission of the murders belonged either to the Acacia Blocc Compton Crip gang or the Santana Blocc Crips. Of all the characters in this drama, then, *only* Petitioner met the description of a Mansfield "homeboy" because the others all were associated with different gangs. It was objectively unreasonable for the state court to hold that a direct, identifying, incriminating reference to the co-defendant did not violate *Bruton*.

FILED
JULY 25, 2005

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ERNEST ALLEN BAILEY Petitioner-Appellee, v. MAGGIE MILLER-STOUT, Respondent-Appellant.	No. 04-35852 D.C. CV-03-05476-RBL
	ORDER
ERNEST ALLEN BAILEY, Petitioner-Appellant, v. MAGGIE MILLER-STOUT, Respondent-Appellee.	No. 04-36035 D.C. CV-03-05476-RBL

Before: PREGERSON, GRABER, and GOULD, Circuit Judges.

The panel has voted to deny the petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc and no judge of the court has requested a vote on it.

The petition for rehearing en banc is DENIED.

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF WASHINGTON

EARNEST A. BAILEY

v.

JUDGMENT IN A
CIVIL CASE

MAGGIE MILLER-STOUT

CASE NUMBER:
C03-5476RBL

__ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

XX **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

The petition is therefore GRANTED.

Petitioner shall be released from custody unless the State of Washington sets a date for a new trial within 120 days from the date of this Order.

September 21. 2004 BRUCE RIFKIN

Date Clerk

s/Caroline M. *Gonzalez*

Deputy Clerk

HONORABLE RONALD B. LEIGHTON

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

EARNEST A. BAILEY PLAINTIFF, v. MAGGIE MILLER-STOUT DEFENDANT.	Case No. C03-5476 RBL ORDER GRANTING WRIT OF HABEAS CORPUS

This Petition for Writ of Habeas Corpus is before the Court on the Report and Recommendation of the Honorable J. Kelley Arnold, United States Magistrate Judge. [Dkt. #15]. The Report recommends that the court grant Mr. Bailey's Petition.

The Court has reviewed the Petition, the Report and Recommendation, the Respondent's Objections to the Report and Recommendation, the Petitioner's Objections and Reply, and the remaining record in the case. It has also heard counsels' oral argument. The Petitioner raises five challenges to his Kitsap County convictions for murder:

1. The use of non-testifying co-defendant Youngblood's statement against him violated Bailey's Sixth Amendment Confrontation Right.

2. The trial court violated Petitioner's rights to due process. compulsory

process and effective assistance of counsel.

3. The state denied Petitioner due process by withholding material, exculpatory evidence related to the whereabouts and potential testimony of Leroy Smith, which would have implicated other suspects in the crimes charged.

4. Defense counsel was ineffective in failing to investigate Smith and Michael Oliver prior to trial.

5. Appellate counsel was ineffective.

The Report's resolution of the Second, Fourth and Fifth issues is thorough and correct, and is therefore ADOPTED in its entirety without additional discussion.

The Court also ADOPTS the Report's recommended resolution of the Third issue, concerning the government's failure to disclose information about Leroy Smith to the defense, and will Grant the Petition on that basis.

Additionally, the First issue raised by the Petitioner is meritorious. The prosecution (and Youngblood's counsel) used Youngblood's statement against Bailey in a manner that violated the Sixth Amendment, and which was not permitted by the Supreme Court's holdings in *Bruton v. United States*, 391 U.S. 123 (1968) and *Richardson v. Marsh*, 481 U.S. 200 (1987) For this reason as well, the Court will Grant the Petition for a Writ of Habeas Corpus.

1. Standard of Review.

The Anti-Terrorism and Effective Death Penalty Act ("AEDPA") bars federal habeas relief on a claim adjudicated on the merits in state court unless the state court adjudication was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," or the adjudication was based on "an unreasonable determination of the facts in light of the evidence presented" at the trial. 28 U.S.C. § 2254(d).

A state court decision is contrary to clearly established Supreme Court precedent if the state court applies a rules that contradicts the governing law set forth in Supreme Court cases or if the state court confronts a set of facts that are materially indistinguishable from a decision of the Supreme Court and nevertheless arrives at a result different from Supreme Court precedent. *Lockyer v. Andrade*, 538 U.S. 63, 123 S. Ct. 1166, 1173 (2003) (citing *Williams v. Taylor*, 529 U.S. 362-405-406, 120 S. Ct. 1495 (2000)).

Under the "unreasonable application" clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from the Supreme Court's decisions but unreasonably applies that principle to the facts of the prisoner's case. The "unreasonable application" clause requires the state court decision to be more than incorrect or erroneous. The state court's application of clearly established law must be objectively unreasonable. *Id.*

2. The Manner in Which Youngblood's Redacted Statement Was Used Against Bailey Violated the Sixth Amendment.

The Sixth Amendment's Confrontation Clause, made applicable to the states through the Fourteenth Amendment, *Pointer v. Texas*, 380 U.S. 400, 403-405 (1965), provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."

If read literally, of course, "the Clause would abrogate virtually every hearsay exception, a result long rejected as unintended and too extreme." *Ohio v. Roberts*, 448 U.S. 56, 63 (1980). Thus, the Supreme Court provides a two-part approach to Confrontation Clause issues: "[W]hen a hearsay declarant is not present for cross-examination at trial, the Confrontation Clause normally requires a showing that he is unavailable. Even then, his statement is admissible only if it bears adequate "indicia of reliability.' Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness." *Id.* at 66.

It is error to admit a non-testifying co-defendant's confession where that statement expressly implicates the defendant. *Bruton v. United States*, 3921 U.S. 123 (1968). "Under *Bruton* and its progeny, the admission of a statement made by a non-testifying co-defendant violates the Confrontation Clause when that statement facially, expressly, clearly, or powerfully implicates the defendant. *United States v. Angwin*, 271 F.3d 786, 796 (9th Cir. 2001)

Here, Petitioner argues the state trial court's admission of co-defendant Youngblood's statement violated his Sixth Amendment rights. Petitioner argues that both the prosecuting attorney and Youngblood's attorney improperly tied Bailey to the redacted Youngblood statement during closing argument. Specifically at issue is a taped statement made by co-defendant Youngblood to Officer Oakley. The statement was redacted, to omit any direct reference to Mr. Bailey, and read to the jury at trial. The redacted statement is located at pages 5246 through 5271 of the state court trial transcripts. Mr. Youngblood's original, complete statement is attached as Exhibit 9 to Petitioner's Personal Restraint Petition, Exhibit 12.

The admission of Youngblood's statement was hotly contested throughout the trial. The parties first argued its use during opening statement, where Mr. Bailey's counsel argued: "As I said, I'm not prepared to argue it fully right now. My objection at this point is that all of the evidence will show that it was Mr. Youngblood, Mr. Bailey, and Mr. Campbell at this apartment getting those guns. This reference to that event creates the need for us to confront Mr. Youngblood as to his recollection. That is the *Bruton* problem, does it create a need for us to confront this witness. It does. We are denied that ability because we fully expect him to take the Fifth Amendment, and therefore it should not come in."

Counsel added that if it were used, the statement would "lead the jury to the inescapable conclusion that Mr. Bailey is the individual referred to in Mr. Youngblood's statement and the use of a pronoun would not cure the *Bruton* problem." Tr. 1517-1518. The trial court disagreed. It allowed certain portions of the statement to be used in opening statement, taking care to exclude any direct reference to Mr. Bailey.

The issue was broached again during Detective Oakley's testimony. The prosecutor argued for admission, stating: "The fact that the jury could possibly infer or add up the evidence and find out who Mr. Youngblood was talking about, that does not make it improper." Tr. 3893. The prosecution argued the statement incriminated Youngblood and was therefore reliable, because in it Youngblood admits he had prior knowledge of what was going to happen, and he admits he allowed the use of his car. Tr. 3894. Mr. Bailey's attorney continued to object, arguing that the redaction had to completely eliminate any prejudice: "If you can't do that and still make sense out of Mr. Youngblood's statements, well then the proper remedy has to be severance." Tr. 3894.

The state trial court was careful to redact and edit Mr. Youngblood's statement with input from the parties. It was also careful to instruct the jury to consider the statement only with respect to Mr. Youngblood, and not to use it against Mr. Bailey. Tr. 5239. This limiting instruction was given at the time the statement was initially read, and several more times during closing argument, when Petitioner's counsel objected to the prosecutor's (and Youngblood's counsel's) use of Mr. Youngblood's statement.

In closing argument, the prosecutor quoted Youngblood's statement, referring to the night before the murder when "he and Campbell" went to Tacoma to get guns. (The original statement actually referred to Youngblood, Campbell and Bailey, but was properly redacted to eliminate the reference to Bailey.) The prosecutor then immediately argued that the Youngblood statement, viewed in conjunction with the other properly admitted evidence, implicated Mr. Bailey:

> Now, remember everything in this statement is to be used against Mr. Youngblood. This is where you have the limiting instruction. Mr. Youngblood's words here are to be used against him. *Recall the evidence, though, of Jeremy Woolman, what Jeremy Woolman said about that incident the night before the murder. Jeremy Woolman said that Juice, Little Bear, and C-Boy were all there together.*[1]

Bailey's attorney immediately objected and moved for a mistrial. The Court acknowledged that "this is getting pretty close to the bell" but denied the motion.

The joint trial of Youngblood and Bailey created an inexorable conflict between the interests of the two defendants with regard to the Youngblood statement. Bailey was entitled to have all reference to his participation in relevant events - indeed, to his very existence - redacted pursuant to *Bruton*. At the same time, Youngblood wanted the jury to believe that he did not participate in the actual murders, and that he had told the truth in his statement to Detective Oakley. As evidence came in, linking the three gang members and activities prior to and after the murders, Youngblood's redacted statement was made to appear untruthful because it omitted references to the third gang member - Bailey. Youngblood's story, that he knew what was going to happen but did not participate in the murders, was not believable in light of the discrepancies between his statement and the testimony of other witnesses.

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[1] Throughout the trial Campbell, Bailey and Youngblood had also been referred to by their gang names: "Juice," "Little Bear," and "C-Boy," respectively.

In order to bolster his credibility, Youngblood's attorney went even further in her closing. She disregarded the limiting instruction and the redaction, and told the jury point blank that Youngblood had implicated Bailey in his statement to Detective Oakley. She said:

> In his statement to Detective Oakley, he denies going to Bremerton on the 20th. He explains his connection to Bailey, to Juice, and to the events.

Bailey's attorney objected, but the court simply repeated the cautionary instruction.

On direct appeal following the guilty verdict, the Washington Court of Appeals addressed primarily the mechanical redaction, while holding that the trial court's ruling on the closing arguments was a matter of discretion:

A nontestifying codefendant's confession is inadmissible at a joint trial, even if the jury is instructed to consider the confession only against the codefendant. *Bruton*, 391 U.S. at 137; *State v. St. Pierre*, 111 Wn.2d 105, 111-12, 759 P.2d 383 (1988). The statement or confession, however, is admissible and severance is not required so long as "deletion of all references to the moving defendant will eliminate any prejudice to him from the admission of the statement." CrR 4.4(c)(1)(ii). Thus, a nontestifying codefendant's confession is admissible when the confession is redacted to eliminate not only the defendant's name, but also any reference to his or her existence. *Richardson v. Marsh*, 481 U.S. 200, 211, 107 S.Ct. 1702, 95 L.Ed.2d 176 (1987); *State v. Cotton*, 75 Wn. App. 669, 690-91, 879 P.2d 971 (1994).

Moreover, if the defendant is then implicated by the confession through linkage with other evidence presented by the State, it is not a sufficient reason to either exclude the testimony or sever the trial. *Richardson*, 481 U.S. at 208; *Cotton*, 74 Wn. App. at 691. Severance and/or exclusion of the statement is appropriate only when the testimony includes "powerfully incriminating extrajudicial statements of a codefendant. *Bruton*, 391 U.S. at 135-[3]6; *Dent*, 123 Wn.2d at 486-87.

Here, Youngblood's confession was redacted such that all references to Bailey were replaced by neutral pronouns such as "someone" or "he or they." [footnote omitted] Bailey was neither directly named nor inferentially implicated in the redacted statement. Bailey was never expressly linked with the redacted statement during the trial, although a large amount of evidence linked Bailey with many of the occurrences described in the redacted statement. Moreover, the trial court repeatedly instructed the jury not to consider against Bailey in any way evidence presented only against Youngblood, including the redacted statement. Thus, the redacted statement did not prejudice Bailey, and severance was not required under CrR 4.4 (c)(1)(ii).

Bailey further asserts that Youngblood's attorney improperly implicated Bailey in the redacted statement during closing arguments. The trial court declined to grant a mistrial. The trial court is in the best position to rule on the prejudicial impact of a statement and its decision is reviewed under the abuse of discretion standard. *State v. Weber*, 99 Wn.2d 158, 166, 659 P.2d 1102 (1983). Under the circumstances

> of this case, the trial court did not abuse its discretion in denying Bailey's motion for a mistrial.

Exhibit 2, at 16-17.

The Washington Court of Appeals denied the claim a second time when it considered Mr. Bailey's personal restraint petition. Again, it addressed primarily the redaction itself. It wrote:

> Bailey claims that the trial court erred by admitting a redacted version of Youngblood's custodial statement in violation of his sixth amendment right to confrontation and the *Bruton* rule. Youngblood's confession was redacted so that all references to Bailey were replaced with neutral pronouns such as "someone' or 'he or they.'" No. 16833-2-II, at 17. This court had considered and rejected Bailey's challenge to the admission of Youngblood's confession. Id. at 16-17. He now seeks reconsideration based on *Gray v. Maryland*, 523 U.S. 185 (1998), which he contends is a significant change in the law concerning the Bruton rule.
>
> In *Bruton v. United States*, 391 U.S. 123, 135-36 (1968), the United States Supreme Court held that admission of a nontestifying codefendant's confession at a joint trial violates the defendant's sixth amendment right to confrontation, even if the jury received instructions to consider the confession only against the

codefendant. The Supreme Court narrowed this rule in *Richardson v. Marsh*, 481, U.S. 200, 211 (1987). There, it held that there is not confrontation right violation if the codefendant's confession is redacted to eliminate the defendant's name and reference to his or her existence. *Richardson*, 481 U.S. at 211. The *Richardson* Court explained that although the defendant was linked to the statement by other properly admitted evidence, it was not incriminating on its face and thus did not violate *Bruton*. 481 U.S. at 208. Here, this court relied on *Richardson* to reject Bailey's *Bruton* argument, holding that admission of Youngblood's confession did not prejudice him. No. 16833-2-II, at 17.

Then, while Bailey's petition for review was pending, the United States Supreme Court decided *Gray v. Maryland*, 523 U.S. 185 (1998). *Gray* held that Bruton's protective rule applies to a redacted confession which references the defendant with obvious indications of alteration, such as blank space or the word "deleted." *Gray*, 523 U.S. at 193-97. The court reasoned that removal of the defendant's name in this manner had the effect of directly referencing the defendant's existence and, thus, "so clo [illegible] resembled

Bruton's unredacted statements that ... the law must require the same result." *Gray*, 523 U.S. at 192.

Bailey contends that the holding in *Gray* constitutes a significant change in the law for purposes of overcoming the procedural bar against relitigating a previously considered claim. The State disagrees and argues that *Gray* did not establish new or different law but merely applied the Bruton rule. Response, at 13. The State is correct. Though *Gray* refined the scope of the Bruton rule, it did not effectively overturn a prior appellate decision and, thus, did not constitute a significant change in the law. *See In re Greening*, 141 Wn2d 687, 697 (2000) (clarifying that "significant change in the law" means "an intervening opinion [that] has effectively overturned a prior appellate decision that was originally determinative of a material issue").

Even if *Gray* constitutes a significant change in the law and this court were to reach the merits of Bailey's claim, it would fail. Recently, in *State v. Larry*, 108 Wn. App. 894 (2001), this court addressed a *Bruton* claim in light of Gray. Larry involved a codefendant's statement that was redacted by substituting the phrase "the driver" for the defendant's name. *Larry*, 108 Wn. App. at 906. This court found that such redaction did not violate Bruton and further noted that the redaction mirrored the format approved in Gray. *Larry*, 108 Wn. App. at 907. Similarly, the redaction here - using neutral pronouns "someone," "he" and "they" - did not violate the Bruton rule as clarified in *Gray*. *Larry*, 108 Wn. App. at 905-06. The *Larry* court observed:

> The Court in Gray would have upheld admission of the redacted confession had it read "[m]e and a few other guys" committed the crime, instead of [m]e, deleted, deleted, and a few other guys." Gray, 523 U.S. at 196-97. [Codefendant's] redacted statement, which refers to a third person, not a blank, mirrors the redaction format that the Supreme Court approved in gray, in spite of the jury's ability to infer that such third person was the unnamed defendant.

Larry, 108 Wn. App. at 907.

See also United States v. Logan, 210 F.3d 820, 822-23 (8th Cir. 2000) (redaction with the term "another individual" did not violate Bruton); *United States v. Taylor*, 186 F.3d 1332, 1335-37 (11th Cir. 1999) (use of the terms "they" and "captain" did not violate Bruton).

Exhibit 16, at 6-8.

Finally, the Washington Supreme Court Commissioner addressed the redaction in rejecting Mr. Bailey's motion for discretionary review. He also deferred to the trial court's discretion with respect to the closing arguments:

> In this case, purported references to Mr. Bailey were replaced with neutral pronouns such as "someone" and "they". The Supreme Court in Richardson expressed no opinion on whether this practice would cure the confrontation problem, Richardson, 481 U.S. at 211 n.5. But in numerous decisions since the, other courts have held that pronouns and other nonspecific terms are acceptable if they do not make obvious either that the statement was redacted or that the term used referred to or directly implicated the defendant. *See, e.g., United States v. Taylor*, 186 F.3d 1332, 1336-37 (11th Cir. 1999); *United States v. Verduzco-Martinez*, 186 F.3de 1208, 1214-15 (10th Cir. 1999); *United States v. Enriquez-Estrada*, 999 F.2d 1355, 1359 (9th Cir. 1993). On direct appeal, the Court of Appeals considered whether the redactions sufficiently neutralized Youngblood's statement and held that they did.
>
> Mr. Bailey argues that a "material change in the law" occurred with the Supreme Court's decision in *Gray v. Maryland*. 523 U.S. 185, 118 S.Ct. 1151, 140 L.Ed.2d 294 (1998). But the Court

in *Gray* held only that obvious deletions, such as use of [the] work "deleted" in place of the defendant's name, fall within the *Bruton* rule. Id. at 191-97. Gray announced no new rule; it simply applied the principles expressed in *Bruton* and *Richardson* to the facts of that case. *Gray* thus constituted no change in the law that would justify revisiting this issue in the interests of justice. The Chief Judge so determined, and Mr. Bailey demonstrates no obvious or probably error.

Nor, in any event, does *Gray* undermine the Court of Appeals decision on direct appeal. Overall, Youngblood's statement, as read to the jury, contains no obvious redactions nor any passages directly or inferentially implicating Mr. Bailey in the crimes. Nor is it evident from the statement that any of the pronouns are even meant to replace references to Mr. Bailey. Most of them seem to refer to "Juice" (Orlandis Campbell), who had been convicted in a separate proceeding. The statement is simply not so "powerfully incriminating," *Bruton*, 391 U.S. at 135, as to overcome the normal presumption that the jury followed the court's instruction to consider the statement only against Youngblood. *See United States v. Logan*, 210 F.3d 820 (8th Cir. 2000).

> Continuing with this issue, Mr. Bailey argues that the prosecutor improperly used Youngblood's statement against him in argument to the jury. But the trial court denied a mistrial on this point, and the Court of Appeals on direct appeal held that the court did not abuse its discretion. Again, Mr. Bailey does not show that the interests of justice require reconsideration of this issue.

Exhibit 17, at 7-8.

The Petitioner argues that the redaction violates the Sixth Amendment and the Supreme Court's decision in *Bruton v. United States*, 391 U.S. 123 (1968), *Richardson v. Marsh*, 481 U.S. 200 (1987), and *Gray v. Maryland*, 523 U.S. 185 (1998). These opinions outline the acceptable parameters of the prosecution's use of the statement of a non-testifying co-defendant, keeping in mind the constitutional right of confrontation guaranteed by the Sixth Amendment. These authorities constitute the "clearly established federal law" against which the state court's decisions must be judged under AEDPA.

Bruton and its progeny represent a narrow exception to the assumption of the law that jurors follow their instructions. Under this line of cases, admission of a non-testifying co-defendant's statement at a joint trial violates the Sixth Amendment's Confrontation Clause if the confession facially incriminates the defendant, notwithstanding an instruction to consider the statement only against the defendant, making the statement. *Richardson v. Marsh*, 481 U.S. at 201-202 (summarizing *Bruton*. A co-defendant's confession is not facially incriminating, and thus does not raise Confrontation Clause concerns, if the confession is "redacted to omit any reference to the defendant . . . [even if] the defendant is nonetheless linked to the confession by evidence properly admitted against him at trial." *Richardson* at 202. A redacted confession facially incriminates the defendant, however, when the redaction merely "replaces a defendant's names with an obvious indication of deletion, such as a blank space, the word 'deleted,' or a similar symbol." *Gray*, 523 U.S. at 194 (noting that these methods of redaction 'accuse[] the defendant in a manner similar to [use of the defendant's name]").

As an initial matter, the court concludes that the wording of Mr. Youngblood's statement to detective Oakley, as redacted by the court and read to the jury, did not violate the Sixth Amendment of these Supreme Court decisions. The Youngblood statement as redacted does not facially incriminate Mr. Bailey in the manner deemed unconstitutional by the Supreme Court. Under *Bruton*, *Richardson*, and *Gray*, the state courts' conclusion that the redacted statement was properly admitted was not an unreasonable application of clearly established federal law.

However, as the Petitioner argues, all of the state courts focused on the *mechanical* aspects of the redaction, without addressing in a meaningful wasy his additional argument that both the prosecutor and Mr. Youngblood's counsel effectively eviscerated the effect of the redaction, and of the court's limiting instruction to use Mr. Youngblood's statement against only Mr. Youngblood, in closing argument. In this court's view, this argument has merit.

In *Richardson v. Marsh*, 481 U.S. 200, 211, 107 S.Ct. 1702, 95 L.Ed.2d 176 (1987), the co-defendant's statement did not facially incriminate defendant Marsh. Other evidence, however, considered in conjunction with the statement, implicated Marsh in the crime. She was convicted, and the District Court denied her Petition for a Writ of Habeas Corpus. The Sixth Circuit reversed, holding that the use of the co-defendant's statement against Marsh was prohibited by *Bruton*.

The Supreme Court reversed and remanded. First, it recognized that *Bruton* was a "narrow exception" to the rule that juries are presumed to follow the court's instructions, an exception that applies only where the co-defendant's statement "powerfully incriminates" the defendant. It declined to extend that exception, citing the presumption's pragmatic value:

> The rule that juries are presumed to follow their instructions is a pragmatic one, rooted less in the absolute certitude that the presumption is true than in the belief that it represents a reasonable practical accommodation of the interests of the state and the defendant in the criminal justice process.

The *Richardson* Court also recognized that redaction of the statement to delete any reference to the defendant, coupled with an instruction to the jury to use the statement only against its maker, complied with *Bruton* and the Sixth Amendment. It therefore reversed the Sixth Circuit.

In doing so, however, it addressed a third problem arising from the use of the non-testifying co-defendant's statement in a joint trial. The *Richardson* Court recognized that the presumption cannot be applied where, as here, the jury is expressly asked to ignore the limiting instruction. The Sixth Amendment prohibits counsel from seeking to undo the curative effect of a cautionary instruction by urging the jury to consider the non-testifying co-defendant's statement, along with other evidence in the case, when evaluating the defendant's case. See *Richardson* at 211:

> In the present case, however, the prosecutor sought to undo the effect of the limiting instruction by urging the jury to use [the non-testifying co-defendant's statement in evaluating [Petitioner's] case. On remand, the court should consider whether in light of respondent's failure to object to the prosecutor's comments, the error can serve as the basis for granting a writ of habeas corpus.

In this case, the prosecutor similarly referenced the limiting instruction, and then immediately asked the jury to "consider, thought," the statement of Mr. Woolman, that Bailey went with Campbell and Youngblood to get the guns.

More egregiously, Mr. Youngblood's counsel's closing argument simply ignored the redaction. She told the jury that, in his statement to Detective

Oakley, Youngblood "explain his connection to Bailey, to Juice, and to the events." In an attempt to rehabilitate her own client's credibility, Youngblood's attorney expressly told the jury that Youngblood's statement implicated Bailey. She sought to undo the effect of the court's oft-repeated limiting instruction.

It is clear that this argument was improper. The issue is whether the error satisfies the high standard of AEDPA - in other words, whether "the state court's adjudication was contrary to clearly established federal law as determined by the Supreme Court." It could be argued, perhaps, that the *Richardson* Court's remarks about the closing argument were *dicta*. But the Court specifically instructed the trial court to consider the issue (and whether it had been waived) on remand.

Furthermore, and in any event, if the Supreme Court-required limiting instruction may be expressly undermined by the prosecutor (or co-defendant's counsel) in closing, it is little more than a magical incantation. The defendant's Sixth Amendment right to confrontation would be rendered meaningless in such a case. This court concludes that the state courts' denial of Bailey's Petition on the basis of the closing arguments was contrary to clearly established federal law, as outlined in *Bruton* and *Richardson*.

"The question is not whether the defendant would more likely than not have received a different verdict . . . but whether . . . he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." *Kyles v. Whitley*, 514 U.S. 419, 434, 115 S. Ct. 1555, 131 L.Ed.2d 490 (1995). Although there is substantial reason to believe that Bailey was involved in these murders, this Court cannot conclude from its review of the record that Bailey received a fair trial in light of the deficiencies outlined here and in the Report and Recommendation. The Petition is therefore **GRANTED**.

Petitioner shall be released from custody unless the State of Washington sets a date for a new trial within 120 days from the date of this Order; and

The Clerk is directed to send copies of this Order to counsel of record.

DATED this 17th day of September, 2004.

/s/ Ronald B. Leighton
RONALD B. LEIGHTON
UNITED STAES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

EARNEST A. BAILEY
Petitioner.
v.
MAGGIE MILLER-STOUT
Respondent.

Case No. C03-5476RBL
REPORT AND RECOMMENDATION
Noted for **February 20, 2004**

This matter has been referred to United States Magistrate Judge J. Kelley Arnold pursuant to 28 U.S.C. § 636(b)(1)(A) and 636 (b)(1)(B), and Local Magistrates Rule MJR3 and MJR4. Petitioner is seeking federal habeas relief, pursuant to 28 U.S.C. § 2254 from state jury convictions for conspiracy to commit a murder in the first degree and two counts of first degree murder, arising out of the Superior Court for Kitsap County, Washington. On June 2, 1998, petitioner was sentenced on all three crimes, receiving consecutive sentences totaling 840 months.

FACTUAL AND PROCEDURAL BACKGROUND

The following summary is taken from petitioner's Appellant's Brief, which was filed with the Washington State Court of Appeals:

> On December 20, 1991, sometime after 7:00 o'clock in the evening, Tyrone Darcheville and Arthur Lewis Randall were shot to death in a house located at 245 South Montgomery Street, Bremerton, Kitsap County,

Washington. There were no eye witnesses to the shootings [omitted]. In late December, 1991, Ernest Allen Bailey, Eugene Jayson Youngblood and Orlandis Campbell were charged with the killings.

Darcheville and Randall were members of a gang called the Acacia Blocc Compton Crip. They were known by their gang nicknames. Darcheville was known as "Taz". Randall was known as "Whizz". Defendant Bailey and defendant Youngblood were members of a gang called Mansfield Gangster Crip. Bailey had the nickname "Little Bear". Youngblood had the nickname "C-Boy". Defendant Campbell, was a member of a gang called Santana Blocc Crip. Campbell had the nickname "Juice". All five were engaged in the business of selling crack or rock cocaine.

Defendants Youngblood and Campbell were arrested and tried. Campbell was convicted. The jury could not reach a verdict on Youngblood. The state elected to re-try Youngblood.

Bailey was subsequently arrested and brought to trial. Over Bailey's objection, Bailey's trial was joined with Youngblood's re-trial. Both defendant Bailey and defendant Youngblood were then, following trial, convicted of one count of Conspiracy to Commit First Degree Murder and two counts of First Degree Murder. It is this second trial that is the subject of this appeal.

The trial was lengthy. Pretrial hearings began on August 17, 1992 and continued until October 2nd. Jury selection began October 5th.

The case went to the jury on December 15, 1992. Throughout this brief RP-PT shall refer to the transcript of the pretrial hearings. RP to the transcript of the trial itself, RP Sentencing to the sentencing hearing and CP to clerk's papers.

Originally, Bailey was represented by attorneys Russell Hauge and Constance O'Brian Bartholomew. Hauge was appointed to represent Bailey the week prior to the beginning of the pretrial hearings. Bartholomew was appointed on Friday, August 14th, only three days prior to the commencement of the pretrial hearings. (PT-RP vol I, 11) Youngblood's counsel, on the other hand, had represented Youngblood through his first trial.

The first matter of business when the court convened on August 17th was the state's motion to join Bailey and Youngblood's cases for trial. (RPPT vol. I, 4) Bailey opposed the motion to join, originally for the reason that counsel needed more time to prepare. (RP-PT vol. I, 11-14, 32-34) Bailey was willing to and did waive his right to a speedy trial to effectuate a continuance of his case. (RP-PT vol I, 43, 112) The court joined the cases and set trial for October 8th, 1992. (RP-PT vol I, 45)

On October 2, 1992, three days prior to the beginning of jury selection, attorney Bartholomew was allowed to withdraw as co-counsel for defendant Bailey. Attorney Steven L. Olsen was subsequently appointed by the court as substitute co-counsel for Bailey. Bailey promptly moved for a continuance. (RP vol. I, 8-17, CP 216) The motion for continuance was denied and jury selection commenced as scheduled.

Bailey also raised the issue of antagonistic defenses. (RP-PT vol. I, 27, 36, CP 149) The state's motion to join was granted over Bailey's objection. (RP-PT vol. I, 91-112) On several occasions over the next four months, Bailey unsuccessfully renewed his motion for severance of the trials. (RP vol. XVIII, 2112, vol. XXIX, 3894, vol. XLII, 5842, vol. XLIV, 6123, 6124 CP, 255, 258A, 258B)

Beginning with opening statements of counsel, continuing through the trial and through the final arguments, the defense of Youngblood was antagonistic to that of Bailey.

Youngblood's defense was that Bailey and Campbell were the killers. Youngblood admitted that he perhaps had prior knowledge that the killings were going to take place, but took no part. (RP vol. XV, 1585-1596, vol. XXIX, 3894, 3901, 3902, vol. XXXVII, 5090, vol. XXXVIII, 5256, vol. XLIV, 6094, 6095, 6098, 6099, 6107, 6110, 6111, 6113, 6114, 6120) Over both defendants' objection, a redacted statement of defendant Youngblood was read to the jury. (RP. vol XXXVII, 5246-5263)

[Omitted]

In its case in chief, over the objection of defendant Bailey, the state called Bailey's former girlfriend, Lovetta Porchia, as a witness. During her direct testimony and on re-cross examination, the state was improperly allowed to impeach Ms. Porchia with prior statements she had allegedly made to detective Andrew J. Oakley. The alleged statements were extremely damaging to Bailey, as they amounted to an admission that he was present and took some part in the killings. (RP vol. XXV 3118-3137, 3140-3212)

The state was then allowed, again over objection, to call detective Oakley to the stand to testify as to the statements allegedly made to him by Ms. Porchia. (RP vol. XXXVII, 5038-5067).

The state also called Orlands Lomax to the stand. (RP vol. XXXVII, 5103-5147) Lomax testified about statements allegedly made by Bailey during the time when Lomax and Bailey had been cellmates in the Kitsap County Jail. The admissions were allegedly made during the period that the trial was going on.

Throughout the trial, Bailey attempted to introduce evidence that a person named Leroy Smith aka "Smitty" was the actual killer. It was Smitty's alleged involvement that led to

> the conflict that led to the withdrawal of Ms. Bartholomew as Bailey's co-counsel. On the evening of the shootings and near the scene of the killings, a pair of eyeglasses was found. Soon after the shootings, a tall black man was seen standing in the doorway of the house where the shootings took place. A tall black man wearing a "Raider's" jacket was seen running from the scene near to where the glasses were found. Near the scene was found a .45 Colt pistol. At the scene were found live .45 cal. rounds and empty shell casings that could have been cycled through or fired by the .45 found near the scene.
>
> The defense attempted to present testimony that Smitty was a tall black male, that he wore glasses similar to those found near the scene, that he had motive to kill the deceased and that he had access to the .45 cal. pistol found near the scene. The testimony was not allowed. (RP vol XVII, 1826-1830, 1927-1935, vol. XXXIX, 5409-5443). Smitty's whereabouts were unknown to Bailey and a warrant was outstanding for his arrest.

It has now come to light that the State was well aware of Smitty's whereabouts. Exhibit 3 at 7-13, attached to Respondent' Submission of State Court Record.

In his petition for writ of habeas corpus filed with this court on August 29, 2003, petitioner raises the following five issues challenging his Kitsap County convictions:

(1) The use of non-testifying codefendants' statements against petitioner violated his Sixth Amendment right to confrontation;

(2) The trial court violated petitioner's rights to due process, compulsory process, and effective assistance of counsel;

(3) The State denied petitioner due process by withholding material, exculpatory evidence implicating Leroy Smith and Michael Oliver;

(4) Alternatively, defense counsel were ineffective in failing to investigate Smith and Oliver prior to trial;

(5) Appellate counsel was ineffective.

Respondent acknowledges that each of the five claims raised by petitioner has been properly exhausted.

After carefully reviewing the petition for writ of habeas corpus, the answer to the petition, and the relevant state court record filed by respondent, this court recommends granting the writ. Each of the issues raised in the petition are discussed below, including the state's prosecutor withholding of information which may have assisted Mr. Bailey defend himself at trial.

EVIDENTIARY HEARING NOT REQUIRED

In its Order Directing Service and Response, the court directed respondent to state whether or not an evidentiary hearing was necessary. The function of an evidentiary hearing is to try issues of fact; such a hearing is unnecessary when only issues of law are raised. *See, e.g., Yeaman v. United States*, 326 F.2d 293 (9th Cir. 1963). The undersigned judge concludes that there are no relevant factual disputes to resolve in order for the Court to render its decision in this case. Accordingly, an evidentiary hearing was not conducted.

DISCUSSION

Federal courts may intervene in the state judicial process only to correct wrongs of a constitutional dimension. *Engle v. Isaac*, 456 U.S. 107 (1983). Section 2254 explicitly states that a federal court may entertain an application for writ of habeas corpus "only on the ground that [the petitioner] is in custody in violation of the constitution or law or treaties of the United States." 28 U.S.C. § 2254(a)(1995). The Supreme court has stated many times that federal habeas corpus relief does not lie for mere errors of state law. *Lewis v. Jeffers*, 497 U.S. 764 (1990); *Pulley v. Harris*, 464 U.S. 37, 41 (1984); *Estelle v. McGuire*, 502 U.S. 62 (1991).

A habeas corpus petition shall not be granted with respect to any claim adjudicated on the merits in the state courts unless the adjudication either (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented to the state courts. 28 U.S.C. §2254(d). Further, a determination of a factual issue by a state court shall be presumed correct, and the applicant has the burden of rebutting the presumption of correctness by clear and convincing evidence. 28 U.S.C. §2254(e)(1).

Before granting relief, the district court must first determine whether the statte court decision was erroneous. *Van Tran v. Lindsey*, 212 F.3d 1143, 1155 (9th Cir. 200), *cert. denied*, 121 5. Ct. 340 (2000). The district court must then determine whether the state court decision involved an unreasonable application of clearly established federal law. *Id.* The district court may grant habeas relief only if it finds the state court decision was unreasonable. *Van Tran*, 212 F.3d at 1153; *Weighall v. Middle*, 215 F.3d 1058, 1063 (9th Cir. 2000).

(i) THE SIXTH AMENDMENT RIGHT TO CONFRONTATION (Claim One)

The Sixth Amendment's Confrontation Clause, made applicable to the states through the Fourteenth Amendment, *Pointer v. Texas*, 380 U.S. 400, 403-405 (1965), provides: "In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him." If read literally, "the Clause would abrogate virtually every hearsay exception, a result long rejected as unintended and too extreme." *Ohio v. Roberts*, 448 U.S. 56, 63 (1980). Thus, the Supreme Court provides a two-part approach to Confrontation Clause issues: [W]hen a hearsay declarant is not present for cross-examination at trial, the Confrontation Clause normally requires a showing that he is unavailable. Even then, his statement is admissible only if it bears adequate 'indicia of reliability.' Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness." *Id.* at 66. It is error to admit a non-testifying co-defendant's confession where that statement expressly implicates the defendants. *Bruton v. United States*, 3921 U.S. 123 (1968). In *United States v. Angwin*, 271 F.3d 786 (9th Cir.2001), the Ninth Circuit held that, "[u]nder Bruton and its progeny, the admission of a statement made by a non-testifying codefendant violates the Confrontation Clause when that statement facially, expressly, clearly, or powerfully implicates that defendant." *Id.* at 796.

Here, petitioner argues the state trial court's admission of statements made by co-defendants Youngblood and Campbell violated his Sixth Amendment rights. Specifically at issue is a taped statement made by co-defendant Youngblood to Officer Oakley. The statement was redacted to omit any direct reference to Mr. Bailey and read to the jury at trial. The statement, as read to the jury, is located at pages 5246 through 5271 of the state court trial transcripts. The un-redacted statement is also included in the record, attached as exhibit 9 to Petitioner's Personal Restraint Petition, Exhibit 12.

The admission of Youngblood's statement was hotly contested several times during trial. First the parties argued its use during opening statement. At that time, Mr. Bailey's counsel argued, "As I said, I'm not prepared to argue it fully right now. My objection at this point is that all of the evidence will show that it was Mr. Youngblood, Mr. Bailey, and Mr. Campbell at this apartment getting those guns. This reference to that event creates the need for us to confront Mr. Youngblood as to his recollection. That is the *Bruton* problem, does it create a need for us to confront this witness. It does. We are denied that ability because we fully expect him to take the Fifth Amendment, and therefore it should not come in." Counsel went on to add that if used, the statement will lead the jury to the inescapable conclusion that Mr. Bailey is the individual referred to in Mr. Youngblood's statement and the use of a pronoun would not cure the *Bruton* problem. Tr. 1517-1518. The trial court disagreed and allowed certain portions of the statement to be used in opening statement, redacted by using an appropriate pronoun to exclude any direct reference to Mr. Bailey.

The issue was broached again during Detective Oakley's testimony. The prosecutor argued for admission stating, "The fact that the jury could possibly infer or add up the evidence and find out who Mr. Youngblood was talking about, that does not make it improper." Tr. 3893. The prosecution argues it is an incriminating statement because Youngblood admits he had prior knowledge of what was going to happen and he admits he allowed the use of his car. Tr. 3894. Mr. Bailey's attorney continued to object, arguing that the redaction had to completely eliminate any prejudice. "If you can't do that and still make sense out of Mr. Youngblood's statements, well then the proper remedy has to be severance." Tr. 3894. The court took a substantial amount of time to review the redacted statement proposed by the prosecutor with the parties and made several additional changes to the statement. In addition, the state trial court instructed the jury to consider this statement only with regard to Mr. Youngblood and not against Mr. Bailey. Tr. 5239. This instruction was given at the time the statement was read, in addition to being given several more times during closing argument when defendants objected to references made to Mr. Youngblood's statement.

The Washington Court of Appeals addressed this issue on direct appeal, stating:

> A nontestifying codefendant's confession is inadmissible at a joint trial, even if the jury is instructed to consider the confession only against the codefendant. *Bruton*, 391 U.S. at 137; *State v. St. Pierre*, 111 Wn.2d 105, 111-12, 759 P.2d 383 (1988). The statement or confession, however, is admissible and severance is not required so long as "deletion of all references to the moving defendant will eliminate any prejudice to him from the admission of the statement." CrR 4.4(c)(1)(ii). Thus, a nontestifying codefendant's confession is admissible when the confession is redacted to eliminate not only the defendant's name, but also any reference to his or her existence. *Richardson v. Marsh*, 481 U.S. 200, 211, 107 S. Ct. 1702, 95 L. Ed. 2d 176 (1987); *State v. Cotten*, 75 Wn. App. 669, 690-91,879 P.2d 971 (1994).

Moreover, if the defendant is then implicated by the confession through linkage with other evidence presented by the State, it is not a sufficient reason to either exclude the testimony or sever the trial. *Richardson,* 481 U.S. at 208; *Cotten,* 75 Wn. App. at 691. Severance and/or exclusion of the statement is appropriate only when the testimony includes "powerfully incriminating extrajudicial statements of a codefendant. *Bruton,* 391 U.S. at *135-[3]6; Dent,* 123 Wn.2d at 486-87.

Here, Youngblood's confession was redacted such that all references to Bailey were replaced by neutral pronouns such as "someone" or "he or they". [footnote omitted] Bailey was neither directly named nor inferentially implicated in the redacted statement. Bailey was never expressly linked with the redacted statement during the trial, although a large amount of evidence linked Bailey with many of the occurrences described in the redacted statement. Moreover, the trial court repeatedly instructed the jury not to consider against Bailey in any way evidence presented only against Youngblood, including the redacted statement. Thus, the redacted statement did not prejudice Bailey, and severance was not required under CrR 4.4(c)(1)(ii).

> Bailey further asserts that Youngblood's attorney improperly implicated Bailey in the redacted statement during closing arguments. The trial court declined to grant a mistrial. The trial court is in the best position to rule on the prejudicial impact of a statement and its decision is reviewed under the abuse of discretion standard. *State v. Weber,* 99 Wn.2d 158, 166,659 P.2d 1102 (1983). Under the circumstances of this case, the trial court did not abuse its discretion in denying Bailey's motion for a mistrial.

Exhibit 2, at 16-17.

The Washington Court of Appeals denied the claim a second time when it considered Mr. Bailey's personal restraint petition. It wrote:

> Bailey claims that the trial court erred by admitting a redacted version of Youngblood's custodial statement in violation of his sixth amendment right to confrontation and the Bruton rule. Youngblood's confession was redacted so that all references to Bailey were replaced with neutral pronouns such as "'someone' or 'he or they.'" No. 16833-2-II, at 17. This court had considered and rejected Bailey's challenge to the admission of Youngblood's confession. Id. at 16-17. He now seeks reconsideration based on *Gray v. Maryland,* 523 U.S. 185 (1998), which

he contends is a significant change in the law concerning the Bruton rule.

In *Bruton v. United States,* 391 U.S. 123, 135-36 (1968), the United States Supreme Court held that admission of a nontestifying codefendant's confession at a joint trial violates the defendant's sixth amendment right to confrontation, even if the jury received instructions to consider the confession only against the codefendant. The Supreme Court narrowed this rule in *Richardson v. Marsh,* 481 U.S. 200, 211 (1987). There, it held that there is no confrontation right violation if the codefendant's confession is redacted to eliminate the defendant's name and reference to his or her existence. *Richardson,* 481 U.S. at 211. The *Richardson* Court explained that although the defendant was linked to the statement by other properly admitted evidence, it was not incriminating on its face and thus did not violate *Bruton.* 481 U.S. at 208. Here, this court relied on *Richardson* to reject Bailey's *Bruton* argument, holding that admission of Youngblood's confession did not prejudice him. No. 16833-2-II, at 17.

Then, while Bailey's petition for review was pending, the United States Supreme Court decided *Gray v. Maryland,* 523 U.S. 185 (1998). *Gray* held that Bruton's protective rule applies to a redacted confession which references the defendant with obvious indications of alteration, such as blank space or the word "deleted." *Gray,* 523 U.S. at 193-97. The court reasoned that removal of the defendant's name in this manner had the effect of directly referencing the defendant's existence and, thus, "so closely resembled Bruton's unreadacted statements that ... the law must require the same result." *Gray,* 523 U.S. at 192.

Bailey contends that the holding in *Gray* constitutes a significant change in the law for purposes of overcoming the procedural bar against relitigating a previously considered claim. The State disagrees and argues that *Gray* did not establish new or different law but merely applied the Bruton rule. Response, at 13. The State is correct. Though *Gray* refined the scope of the Bruton rule, it did not effectively overturn a prior appellate decision and, thus, did not constitute a significant change in the law. *See In re Greening,* 141 Wn.2d 687, 697 (2000) (clarifying that "significant change in the law" means "an intervening opinion [that] has effectively overturned a prior appellate decision that was originally determinative of a material issue").

Even if *Gray* constitutes a significant change in the law and this court were to reach the merits of Bailey's claim, it would fail. Recently, in *State v. Larry,* 108 Wn. App. 894, (2001), this court addressed a *Bruton* claim in light of Gray. Larry involved a codefendant's statement that was redacted by substituting the phrase "the driver" for the defendant's name. *Larry,* 108 Wn. App. at 906. This court found that such redaction did not violate Bruton and further noted that the redaction mirrored the format approved in Gray. *Larry,* 108 Wn. App. at 907. [footnote 5] Similarly, the redaction here - using neutral pronouns "someone," "he" and "they" - did not violate the Bruton rule as clarified in *Gray. Larry,* 108 Wn. App. at 905-06. [footnote 6] [court's footnote 5] The Larry court observed:

> The Court in Gray would have upheld admission of the redacted confession had it read "[m]e and a few other guys" committed the crime, instead of [m]e, deleted, deleted, and a few other guys." Gray, 523 U.S. at 196-97. [Codefendant's] redacted statement, which refers to a third person, not a blank, mirrors the redaction format that the Supreme Court approved in Gray, in

> > spite of the jury's ability to infer that such third person was the unnamed defendant.
>
> *Larry,* 108 Wn. App. at 907.
>
> [court's footnote 6] *See also United States* v. *Logan,* 210 F.3d 820, 822-23 (8th Cir. 2000) (redaction with the term "another individual" did not violate Bruton); *United States* v. *Taylor,* 186 F.3d 1332, 1335-37 (11th Cir. 1999) (use of the terms "they" and "captain" did not violate Bruton).

Exhibit 15, at 6-8. Finally, the Commissioner of the Washington Supreme Court addressed the issue when Mr. Bailey filed a motion for discretionary review:

> In this case, purported references to Mr. Bailey were replaced with neutral pronouns such as "someone" and "they". The Supreme Court in Richardson expressed no opinion on whether this practice would cure the confrontation problem, Richardson, 481 U.S. at 211 n. 5. But in numerous decisions since then, other courts have held that pronouns and other nonspecific terms are acceptable if they do not make obvious either that the statement was redacted or that the term used referred to or directly implicated the defendant. *See, e.g., United States* v. *Taylor,* 186 F.3d 1332, 1336-37 (11th Cir. 1999);

United States v. *Verduzco-Martinez, 186* F.3d 1208, 1214-15 (l0thCir. 1999); *United States v. Enriquez-Estrada,* 999 F.2d 1355, 1359 (9th Cir. 1993). On direct appeal, the Court of Appeals considered whether the redactions sufficiently neutralized Youngblood's statement and held that they did.

Mr. Bailey argues that a "material change in the law" occurred with the Supreme Court's decision in *Gray* v. *Maryland,* 523 U.S. 185, 118 S. Ct. 1151, 140 L. Ed. 2d 294 (1998). But the Court in *Gray* held only that obvious deletions, such as use of [the] word "deleted" in place of the defendant's name, fall within the Bruton rule. Id. at 191-97. Gray announced no new rule; it simply applied the principles expressed in *Bruton* and *Richardson* to the facts of that case. *Gray* thus constituted no change in the law that would justify revisiting this issue in the interests of justice. The Chief Judge so determined, and Mr. Bailey demonstrates no obvious or probable error.

Nor, in any event, does *Gray* undermine the Court of Appeals decision on direct appeal. Overall, Youngblood's statement, as read to the jury, contains no obvious redactions nor any passages directly or inferentially implicating Mr. Bailey in the crimes. Nor is it evident

> from the statement that any of the pronouns are even meant to replace references to Mr. Bailey. Most of them seem to refer to "Juice" (Orlandis Campbell), who had been convicted in a separate proceeding. The statement is simply not so "powerfully incriminating," *Bruton*, 391 U.S. at 135, as to overcome the normal presumption that the jury followed the court's instruction to consider the statement only against Youngblood. *See United States* v. *Logan*, 210 F.3d 820 (8th Cir. 2000).
>
> Continuing with this issue, Mr. Bailey argues that the prosecutor improperly used Youngblood's statement against him in argument to the jury. But the trial court denied a mistrial on this point, and the Court of Appeals on direct appeal held that the court did not abuse its discretion. Again, Mr. Bailey does not show that the interests of justice require reconsideration of this issue.

Exhibit 17, at 7-8.

In this case, the Supreme Court's decisions in *Bruton v. United States*, 391 U.S. 123 (1968), *Richardson v. Marsh*, 481 U.S. 200 (1987), and *Gray v. Maryland*, 523 U.S. 185 (1998), constitute the relevant clearly established federal law. Under this line of cases, admission of a non- testifying co-defendant's statement at a joint trial violates the

Confrontation Clause if the confession facially incriminates the defendant. *Richardson*, 481 U.S. at 201-02 (summarizing *Bruton*). A co-defendant's confession is not facially incriminating and thus does not raise Confrontation Clause concerns, if the confession is "redacted to omit any reference to the defendant ... [even if] the defendant is nonetheless linked to the confession by evidence properly admitted against him at trial." *Id.* at 202. A redacted confession facially incriminates the defendant, however, when the redaction merely "replaces a defendant's name with an obvious indication of deletion, such as a blank space, the word 'deleted,' or a similar symbol." Gray, 523 U.S. at 194 (noting that these methods of redaction "accuse[ ] the defendant in a manner similar to [use of the defendant's name]").

The redacted Youngblood statement read to the jury does not facially incriminate Mr. Bailey in the manner deemed unconstitutional by the Supreme Court. In view of *Bruton*, *Richardson*, and *Gray*, the state court's conclusion that the redacted statement was properly admitted was not an unreasonable application of clearly established federal law. The court has carefully reviewed petitioner's arguments supporting his claim that the statements of Mr. Youngblood and Mr. Campbell violated his right to confrontation, and finds no constitutional error in the state court's analysis of the issue. Consequently, Mr. Bailey is not entitled to relief on the basis that his right to confrontation at his state court criminal trial was violated.

(II) DUE PROCESS; COURT'S EXCLUSION OF EVIDENCE AND ARGUMENT IMPLICATING LEROY SMITH

(Claim Two)

Defendants have a right to present a defense. *Chambers v. Mississippi*, 410 U.S. 284, 301 (1973); *Galindo v. Ylst*, 971 F.2d 1427, 1429 (9th Cir. 1992), *cert. denied,* 113 S. Ct. 2351 (1993). "The state court's decision to exclude certain evidence must be so prejudicial as to jeopardize the defendant's due process rights." *Tinsley v. Borg*, 895 F.2d 520,530 (9th Cir. 1990), *cert. denied,* 498 U.S. 1091 (1991). No constitutional error occurs where the evidence is not relevant. *Wood v. Alaska*, 957 F.2d 1544, 1550 (9th Cir. 1992).

Here, Mr. Bailey argues the state court improperly excluded evidence and argument he attempted to introduce at trial which implicated Leroy Smith. According to petitioner, the trial court allowed him to generically argue that others may have committed the crime, but precluded him from specifically naming any individuals.

A state court may exclude "other suspect" evidence if the evidence "simply affords a possible ground of suspicion against such person". *People of Territorv of Guam v. Ignacio*, 10 F.3d 608,615 (9th Cir. 1993) *(quoting Perry v. Rushen*, 713 F.2d 1447, 1449 (9th Cir. 1983), *cert. denied*, 469 U.S. 838 (1984)). To be admissible, such evidence "must be coupled with substantial evidence tending to directly connect that person with the actual commission of the offense." *Ignacio*, 10 F.3d at 615 (emphasis in original); *see also United States v. Domina*, 784 F.2d 1361, 1365-67 (9th Cir. 1986), *cert. denied*, 479 U.S. 1038 (1987).

At trial Bailey presented the following evidence as an offer of proof in support of his "other suspect" evidence: (1) Smith's glasses were found near the house where the murders occurred; (2) Smith formerly belonged to the same gang as the victims and later joined a rival gang; (3) Smith often sold cocaine; (4) Smith once had an argument with one of the victims; (5) Smith fit the general description of a person seen leaving the victim's home at the time of the murder. Tr. 5413-16; Exhibit 2, at 22; 39. The superior court found the evidence insufficient. The Washington Court of Appeals agreed, holding that the trial judge properly excluded the evidence:

> The trial court concluded that the evidence presented was not sufficient to establish a proper foundation that Smith was connected with the murders. Specifically, the trial court found that although Bailey offered evidence that a man fitting Smith's general description may have been observed at the crime scene, and that Smith dealt in drugs and had harsh words for the victims, Bailey did not offer proof that Smith was at the scene of the crime or even possessed a firearm with which to commit the crimes.

Exhibit 2, at 22-23.

As discussed below, this court finds that the prosecutor unconstitutionally failed to reveal that they had located and spoke to Mr. Smith. It is clear that had Mr. Smith's whereabouts been known, the trial court's decision on the issue of whether or not to allow evidence and argument implicating Mr. Smith at trial should have been different.

As it stands, the state court properly excluded the evidence, and the state court decision is not contrary to or an unreasonable application of clearly established federal law. However, the trial judge's decision is undermined by the unconstitutional withholding of information, as discussed below.

(iii) DUE PROCESS; WITHHOLDING EXCULPATORY EVIDENCE (Claim Three)

A defendant's due process rights are violated when the state fails to disclose "evidence favorable to an accused ... where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady v. Maryland*, 373 U.S. 83, 87 (1963). The prosecution's duty to disclose favorable evidence is not dependent upon a request from the accused, and even an inadvertent failure to disclose may constitute a violation. *United States v. Agurs*. 427 U.S. 97, 107 (1976). As the Supreme Court has observed, *Brady* and its progeny "illustrate the special role played by the American prosecutor in the search for truth in criminal trials." *Strickler v. Greene*. 527 U.S. 263, 281 (1999). A *Brady* violation occurs where the State suppressed the evidence, either willfully or inadvertently; the evidence at issue was favorable to the accused, because it is either exculpatory or impeachment material; and the evidence was material to the outcome such that the defendant was prejudiced by the suppression. *Id.* at 281-82.

Mr. Bailey argues the prosecutor failed to disclose the whereabouts or information needed by the defense to contact and communicate with Leroy Smith. "Had the defense been able to contact Smith during trial, he would have admitted at least the following: he requires prescription glasses; he was courted in (beaten) to the Acacia Block Crips by several people including Randall and Darcheville in January 1991; he was courted out (which again involved being beaten) in October of 1991; Darcheville was one of the people who beat him on this occasion; his girlfriend was "Sensoria"; he knew Michael Oliver because both served on the U.S.S. Nimitz; he owned a Raider's jacket, but claimed to have lost it before December 20, 1991; he spoke with the State's investigator during Bailey's trial and provided an address and telephone number where he could be reached; he stole a .45 handgun from Daetra Adams; (He claimed this gun was modified to a .22.); Smith swore to all of the above in a declaration filed after Bailey's trial." Petition at 11. In addition, Mr. Bailey argues Mr. Smith's availability would have led to the disclosure of details related to Michael Oliver which, along with testimony from Theresa and India Spates, strongly implicates Mr. Smith.

At trial, on December 7, 1992, the following colloquy between the court and Mr. Bailey's attorney, Russell Hauge, took place when the issue of evidence concerning "other suspects" was considered:

> THE COURT: I don't know where

> Mr. Smith lives. There's nothing indicated in this memoranda where Mr. Smith lives. I know that he has been identified as being in Bremerton at a couple of different places.
>
> MR. HAUGE: We don't know where he lives either. We don't know where he lived at that time. We don't know where he lives now, or else we'd bring him before you. Nobody seems to know.

Tr. 5429-5430. The Prosecuting Attorney, Danny Clem, and Deputy Prosecuting Attorney Mike Savage were present in court when these comments were made on the record. Mr. Savage argued on the state's behalf on the general issue, and at one point stated, "Mr. Hauge's making a quantum leap based on the existence of eye glasses. We don't know when they got there, how they got there, why they got there." Tr. 5432. Mr. Savage failed to disclose to the court that the prosecutor's office had located and spoken to Mr. Smith in regard to this matter just a few days prior. As explained below, the prosecutor knew Mr. Smith's current address at the time and failed to tell the court or the defense this information.

Based on the argument heard on December 7, 1992, the trial court did not allow Mr. Bailey to introduce evidence specifically associating Mr. Smith to the scene of the crime. Tr. 5435. At a subsequent moment explaining the ruling, the trial court stated, "I don't have him [Mr. Smith] in Bremerton on or about December 20th, 1991. I don't know where he resides. I know that he was in Tacoma on an occasion, and he was in Bremerton on an occasion. That's all I know about him. Or that's all I'm told that there is any evidence concerning Mr. Smith." Tr. 5438.

Following trial and conviction, investigators for Mr. Bailey spoke with Richard Kitchen on or about February 8, 1993. Mr. Kitchen was an investigator for the Kitsap County Prosecutor who worked on the case. Mr. Kitchen apparently told Mr. Bailey's investigators that during the trial he had located and spoken to Mr. Smith. According to Mr. Kitchen's affidavit, filed in response to Mr. Bailey's request for a new trial, Mr. Kitchen was directed by Deputy Prosecutor Rich Woodrow to find Mr. Smith and subpoena him as a rebuttal witness for the state. Accordingly, on November 23, 1992, Mr. Kitchen contacted Mr. Smith's mother in Baltimore and left a message with her to have Mr. Smith return his call. Two days later Mr. Smith called Mr. Kitchen. Mr. Smith was living in Baltimore with his Aunt, who did not have a phone. Mr. Smith provided his mother's address and phone numbers if he needed to be contacted. Mr. Kitchen notified Deputy Prosecutor Woodrow of the conversation, and he states Mr. Woodrow advised him that Mr. Smith was no longer needed.

After finding out Mr. Smith had been contacted by the prosecutor's office, Mr. Bailey's investigators also learned that Mr. Smith was associated with Michael Oliver, and this information further led the investigators to the home of Teresa and India Spates (mother and daughter, respectively) where Mr. Oliver lived at the time of the murders. Exhibit 12, Petitioner's Personal Restraint Petition at 32. India Spates offered the following information:

- Mike Oliver had been staying at her house for about two months prior to the murders.

- On the late afternoon of December 20, 1991, before 5:00 p.m., Oliver left the house driving her mother's blue Buick Regal (the Regal with the stereo).

- At about 7:00 p.m., India got a call from Al Dixon, who told her that "Taz and Whiz are shot." About a half hour after that, Oliver returned to the house, still driving the Regal. Oliver was acting very defensive, withdrawn and tense, which was unusual for him.

- Oliver went directly to the bathroom and ran the water in the sink for a very long time. Oliver said something about changing his clothes in the bathroom.

- When Ian Corbett made a comment about how Randall and Darcheville were killed, Oliver said: "Shut up you don't know what you're talking about, you weren't there ... mind your own business." Exhibit 12 at 32; Declaration of India Spates, dated March 9, 1999, filed with petitioner's Personal Restraint Petition; see also Affidavit of India Spates, dated January 27, 1994, filed by the Prosecuting Attorney in response to Mr. Bailey's motion for a new trial (Exhibit 7):

Teresa Spates has also provided significant information relevant to Mr. Bailey's defense. Teresa Spates offered the following facts:

- The day before the murders, Mike Oliver got into an argument with Tyrone Darcheville and Louis Randall at her home. All three men drew guns. Oliver started the argument by accusing Randall and Darcheville of snitching on him, causing him to be busted for a drug deal.

- Just before leaving the house in her blue Regal on December 20, 1991, Oliver made some telephone calls and seemed to be arranging drug sales. Oliver indicated that he was "not holding" at the time. When he left, Oliver said he was about to "take care of some business."

- When Oliver returned, he was sweating and seemed mad or upset. Oliver stated that Tazz and Whizz had been killed. He said "one was under the bed .. shot in the neck. . and the other went for a gun and they dropped him." Oliver later stated that the one under the bed looked like he was praying, and the other victim looked like he was trying to get a weapon from the closet.

- When he returned, Oliver went straight into the bathroom screaming "Tammy bring me some clothes." Oliver started washing up. He had blood spatters on the front of him and on his tennis shoes. He removed a sweat shirt with a sports team on it. Spates was not sure, but believed it could have had a silver "Raider's" logo. When asked about the blood, he stated: "It just wasn't supposed to be like that, it just wasn't supposed to happen like that." Oliver stated that he had had an argument with Tazz and Whizz before they were shot, and "Tazz bitch slapped him and punked him out in front of everybody." Oliver said he had a .45 with him. He said he had to get rid of it. Oliver explained in detail how the victims were killed. He said the one that dived under the bed got shot first, through the mattress.

- Oliver then asked to use Spate's other car, a brown Regal, claiming that the blue Regal was "all fucked up." In fact, there was nothing wrong with the blue Regal.

- Later that evening, Oliver placed calls to drug customers from Spate's house indicating that he had drugs on him.

- In describing the murders, Oliver stated that "Smitty 'tripped,' ripped his glasses off and threw them down;" Smitty "wigged out" and Smitty "broke" (ran). Spates volunteered this information without being asked anything about Leroy Smith, and without being told that his glasses were found at the scene. Exhibit 12 at 33-34, and declaration of Teresa Spates, which was also attached to Defendant's Supplemental Memorandum in Support of Motion to Vacate Judgment (11/30/94).

As noted, Mr. Bailey presented the issue of "other suspect" evidence and the prosecution's failure to disclose the whereabouts of Mr. Smith as a basis for his request for a new trial. Exhibits 5 & 6. On December 20, 1994, the trial court judge considered the request. Exhibit 9. In light of state criminal rule CrR 4.7(4), the trial judge denied the request. The judge wrote:

> CrR4.7(4) limits the prosecutor's disclosure duty to information "within the knowledge, possession or control of members of the prosecution attorney's

> staff." Competent evidence shows Smith's precise whereabouts were unknown and Smith initiated all contact with the prosecutors during the trial. Furthermore, CrR 4.7(a)(1)(i) only requires disclosure of the names and addresses of persons who will be called as witnesses at hearing or trial. Mr. Smith was not a witness for the State, in its case in chief or rebuttal, and therefore does not fall within the rule. CrR 4.7 has not been violated.

Exhibit 9. The trial court also reviewed the relevance of Teresa Spate's proposed testimony, which linked Mr. Smith with Mr. Oliver. Mr. Bailey claimed that the information provided by Teresa Spates and Mr. Oliver could have provided useful facts to corroborate his defense theory that Mr. Smith was involved with the murders. The trial court ruled:

> While the testimony of Teresa and India Spates may be material in terms of pointing a finger at Oliver and Smith, it is not material as to Bailey. None of the admissible evidence remotely exonerates the defendant; there is no reasonable probability that the Spates testimony would have changed the outcome of Bailey's trial. ...

Exhibit 9, at 2.

On direct appeal, the Washington Court of Appeals considered the issue of "other suspect" evidence and determined that the state trial judge did not err. It wrote:

> The trial court concluded that Bailey failed to prove that disclosure of Smith's location would have been "material," for "[e]vidence presented suggesting others might also have been involved in the crime does not exculpate Bailey or aid him in his quest for a new trial." We have already addressed this issue and do not repeat the analysis here.
>
> Bailey has presented only unsupported assertions that "if Smith had been interviewed, then Smith would have provided information which would have either exonerated Bailey or provided the necessary foundation to admit the evidence. Smith already submitted an affidavit in this case, where he denied any connection with the murder. Bailey has not shown that being able to interview Smith would have produced a "material" difference at trial.

Exhibit 2. at 24-25. Having considered the issue on direct appeal, the State Court of Appeals refused to reconsider the issue following the trial court's denial of Mr. Bailey's request to vacate the judgment and conduct a new trial. Exhibit 15 at 9 (The Court of appeals refused to consider the issue presented in Mr. Bailey's Personal Restraint Petition). Similarly, the Washington State Supreme Court rejected Mr. Bailey's request to review the issue, due to Mr. Bailey's failure to show that a reexamination of the issue was in the interest of justice. Exhibit 17 at 8.

After carefully reviewing the record, this court finds the state courts' decisions are contrary to and an unreasonable application of clearly established federal law. The state courts' decisions (the trial court's review of the motion for a new trial and the state court of appeals' and the state supreme court's denial to review the issue) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented.

Federal law is clearly established. In *Brady v. Maryland*, 373 U.S. 83 (1963), the Supreme Court reaffirmed its prior holdings that suppression of evidence favorable to the defense is a denial of due process. The Court held that suppression of "material" evidence by the prosecution results in a due process violation, regardless of whether there is good faith on the part of the prosecution. *Brady*, 373 U.S. at 87, 83 S.Ct. 1194. A new trial is required if the violation in any reasonable likelihood affected the judgment of the jury .... " *Giglio v. United States*, 405 U.S. 150, 154 (1972).

The state prosecutor's failure to disclose the fact that they had located and spoken to Mr. Smith, either to the court at trial on December 7, 1992, when the issue was discussed on the record, or to defendant's attorneys on or about November 25, 1992, when Mr. Kitchen made contact with Mr. Smith after being directed to find Mr. Smith and subpoena him as a rebuttal witness, was material to Mr. Bailey's defense. As argued by counsel numerous times at trial, Mr. Bailey sought to introduce evidence to present to the jury that the crimes could have been conducted by another individual or individuals, including Mr. Leroy Smith.

As discussed above, the trial court found that "other suspect" evidence was not allowed without Mr. Bailey's attorney's presentation of significant corroborating evidence specifically implicating Mr. Smith. Had Mr. Smith's whereabouts and current address been disclosed by the prosecution, Mr. Hauge and his investigator would have been able to subpoena Mr. Smith. Mr. Bailey's defense attorneys would have been able to interview Mr. Smith and more thoroughly prepare their defense. It is reasonably likely that the trial judge would have allowed Mr. Bailey to present specific testimony implicating Mr. Smith.

Had such evidence been allowed at trial it is reasonably likely that such testimony would have affected the judgment of the jury. "The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." *Kyles v. Whitley*, 514 U.S. 419,434, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995). Having reviewed the petition, answer, and record, this court is not confident that Mr. Bailey received a fair and just trial.

(iv) INEFFECTIVE ASSISTANCE OF COUNSEL (Claims Two, Four and Five)

Ineffective assistance of counsel claims require a showing that (1) counsel's performance was constitutionally deficient, and (2) but for this deficiency, there is a reasonable probability that the outcome . would have been different. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Considering the first prong, petitioner must rebut "a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance," and that counsel's performance was "sound trial strategy." *Id.* at 689. The Court must attempt to "eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Id.* To meet the second *Strickland* requirement of prejudice, "defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694.

In his petition under the subtitle "Ground two" Mr. Bailey states, "The trial court's exclusion of evidence and argument implicating Leroy Smith violated Bailey's rights to due process, compulsory process, and effective assistance of counsel." Mr. Bailey does not further develop his claim of effective assistance of counsel as it relates to this Claim. Claim two is discussed above and no error was found.

"Ground four" of the petition states, "In the alternative, defense counsel were ineffective in failing to investigate Smith and Oliver prior to trial." Petitioner argues that had the defense been given sufficient time and money to conduct pretrial investigation, the information related to Leroy Smith and Michael Oliver could have been presented at trial. As discussed above, the evidence was reviewed by the state courts in collateral proceedings and reasonably found that it would not have changed or undermined the outcome of the case. The argument that the state court did not provide sufficient time for pretrial discovery or the funds needed by defense counsel to do further investigation does not support an ineffective assistance of counsel claim. Arguably, counsel did what they could do with the time and money available at the time. Petitioner has not shown his defense counsel's performance was constitutionally deficient.

Finally, petitioner argues his appellate counsel was ineffective in his handling of grounds one and two. This argument is without merit. As discussed above, no error was established based on claims one and two. The state court properly reviewed both claims in light of the appropriate federal standards. Petitioner has failed to show how his appellate counsel's performance was constitutionally deficient and/or prejudicial.

CONCLUSION

Based on the foregoing discussion, the Court should grant petitioner a writ of habeas corpus because the state prosecutor failed to disclose the known address, phone number and whereabouts of Mr. Leroy Smith. In addition to this error, the court notes the cumulative effect of the issues raised which also undermine the confidence in the trial's result. "Although no single alleged error may warrant habeas corpus relief, the cumulative effect of errors may deprive a petitioner of the due process right to a fair trial." *Karis v. Calderon*, 283 F.3d 1117, 1132 (9th Cir.2002).

Time constraints played a substantial role in the case from the beginning. Mr. Bailey was arrested in Los Angeles and transported to Kitsap County at the end of July 1992. Mr. Hauge was appointed approximately one week prior to the pre-trial hearing to join the two cases. Pre-trial motions were considered until the eve of trial, October 2, 1992. Mr. Hauge argued each time the issue of severance or joinder was raised that he would like to have more time to prepare for trial. Three days before trial began, one of Mr. Bailey's two attorneys was forced to withdraw due to a conflict of interest regarding Mr. Smith and a new attorney was appointed to assist Mr. Hauge. Mr. Bailey's case was nonetheless joined with Mr. Youngblood's and this essentially prevented Mr. Bailey from receiving any extension of time despite repeated efforts to waive his speedy trial rights. As discussed above, joinder of the two defendants produced lengthy and numerous arguments regarding the admission of Mr. Youngblood's statement. While these factors may not independently justify a writ of habeas corpus, taken together and in combination with the state prosecutor's failure to disclose the address and whereabouts of Mr. Smith, the confidence in Mr. Bailey's criminal conviction is undermined to the extent that, in this court's opinion, Mr. Bailey must be afforded a new trial.

Pursuant to 28 U.S.C. § 636(b)(1) and Rule 72(b) of the Federal Rules of Civil Procedure, the parties shall have ten (10) days from service of this Report to file written objections. *See also* Fed.R.Civ.P. 6. Failure to file objections will result in a waiver of those objections for purposes of appeal. *Thomas v. Arn*, 474 U.S. 140 (1985). Accommodating the time limit imposed by Rule 72(b), the clerk is directed to set the matter for consideration on **February 20, 2004,** as noted in the caption.

DATED this 2nd day of February, 2004.

/s/ J. Kelley Arnold

J. Kelley Arnold

United States Magistrate Judge

FILED

MAY 28, 2003

THE SUPREME COURT OF WASHINGTON

In re the Personal Restraint) **ORDER**
Petition of) No. 72859-3
ERNEST BAILEY,) C/A No. 24481-1-II
Petitioner.)
______________________________)

Department II of the Court (composed of Chief Justice Alexander and Justices Madsen, Ireland, Chambers and Fairhurst) considered this matter at its May 28, 2003, Motion Calendar and unanimously agreed that the following order be entered.

IT IS ORDERED:

That the Petitioner's Motion to Modify the Commissioner's Ruling is denied.

DATED at Olympia, Washington this 28th day of May, 2003.

For the Court

/s/ Gerry L. Alexander
CHIEF JUSTICE

THE SUPREME COURT OF WASHINGTON

In re the Personal Restraint Petition of ERNEST ALLEN BAILEY Petitioner.	No. 72859-3 RULING DENYING REVIEW

In 1993, Ernest Bailey and Eugene Youngblood were convicted in a joint trial of two counts of first degree murder and one count of conspiracy to commit first degree murder. Mr. Bailey appealed to Division Two of the Court of Appeals. He also moved to vacate the judgment under CrR 7.8(b), and when the trial court denied that motion, Mr. Bailey appealed that ruling as well. The Court of Appeals consolidated Mr. Bailey's two appeals with each other and with Youngblood's appeals, and affirmed the convictions. This court denied review. *State v. Youngblood,* 134 Wn.2d 1016, 958 P.2d 315 (1998).

Mr. Bailey timely filed a personal restraint petition in the Court of Appeals, asserting grounds for relief he had raised in both of his appeals as well as one new ground. The Court of Appeals dismissed the petition pursuant to RCW 10.73.140, ruling that it was improperly "successive" to Mr. Bailey's previous CrR 7.8 motion. But this court reversed and remanded, holding that the prior filing of a postconviction motion for relief in the trial court does not subject a first, nonfrivolous petition to summary dismissal under RCW 10.73.140. *In re Bailey,* 141 Wn.2d 20, 28, 1 P.3d 1120 (2000).

On remand, the Chief Judge of the Court of Appeals found no merit to the new issue Mr. Bailey raised and no reasons in the interests of justice to reconsider the issues Mr. Bailey had raised on direct appeal. He therefore dismissed the petition. Mr. Bailey again seeks this court's discretionary review. RAP 16 .14(c); RAP 13.5.

Mr. Bailey first argues that the Chief Judge procedurally erred in dismissing his new issue. He correctly notes that the Chief Judge may dismiss a petition (rather than refer it to a panel of the court) only if the issues raised are "frivolous." RAP 16. 11 (b). And he urges that this court previously found that the new issue was not frivolous. *See Bailey,* 141 Wn.2d at 27-28 n.4. Therefore, he reasons, the Chief Judge erroneously dismissed the issue without referring to a panel. But in *Bailey* this court only determined that the new issue was not "frivolous" for purposes of the statutory bar on successive petitions. As the court explained in a later decision, a "nonfrivolous" ground in that context is simply a "significant legal issue not previously raised and adjudicated." *In re Becker,* 143 Wn.2d 491, 499, 20 P.3d 409 (2001). The court did not purport to address whether the issue was "frivolous" on its merits for purposes of the Chief Judge's initial consideration under RAP 16.11 (b). The Chief Judge remained free to determine that the issue clearly lacked merit and thus should be dismissed.

Turning to the new issue, Mr. Bailey argues that the trial court erred in refusing to disclose the identity of a confidential informant who had provided the police information about the murders. When the matter came up at trial, the court held an in camera hearing. The State represented that the informant was unavailable, so the court questioned only the detective who had interviewed the informant. After the hearing, the court declined to disclose the informant's identity, finding that the information the informant provided was entirely inculpatory and thus would not have helped the defense. Mr. Bailey contends that the court erred, first, in not examining the informant and, second, in not allowing the defense to submit questions. He also urges that the Chief Judge erred in refusing to unseal the record of the in camera hearing for purposes of review.

The constitutional right to compel the attendance of witnesses is limited to those witnesses who are material to the defense. *State v. Smith,* 101 Wn.2d 36, 41, 677 P.2d 100 (1984). The defendant bears the burden of establishing materiality by showing a colorable need for the person to be summoned. *Id.* at 41-42. Where a confidential informant is concerned, confidentiality must give way when, on balance, the informant's identity, or the contents of his communication, is relevant and helpful to the defense or is essential to a fair determination of the case. *State v. Harris,* 91 Wn.2d 145, 148-50, 588 P.2d 720 (1978). The preferred method for making this determination is an in camera session at which the judge hears the informant's testimony and allows the defense to submit questions. *Id.* at 150; *Smith,* 101 Wn.2d at 44. But an in camera hearing is necessary only when the defendant makes the initial showing of materiality. *State v. Fredrick,* 45 Wn. App. 916, 920, 729 P.2d 56. (1986). This showing may not be based on speculation. *Id.*

Given the informant's evident unavailability, the trial court here did all it reasonably could by questioning the detective who had interviewed the informant. And although the court presented no defense questions, defense counsel did not submit any questions nor did he object to the procedures the trial court employed. There is little else counsel realistically could have done, since he neither knew the informant's identity nor his relation to the investigation. Mr. Bailey argues that counsel was thus ineffective, but he shows neither deficient performance nor prejudice. *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). And overall, Mr. Bailey does not demonstrate that the procedures the trial court employed actually and substantially prejudiced him or resulted in a complete miscarriage of justice. *In re Lord*, 123 Wn.2d 296, 303, 868 P.2d 835 (1994).

As for the Chief Judge's refusal to unseal the record, I agree with his determination that Mr. Bailey demonstrated no compelling reason for doing so. *See* GR 15(d)(1) (sealed records may be unsealed only upon proof of compelling circumstances). Recognizing Mr. Bailey's difficulty in challenging the trial court's ruling without access to the record, the Chief Judge examined the transcript and determined that it supported the trial court's ruling. I have also reviewed the transcript and I conclude the Chief Judge did not err.

All of the other issues Mr. Bailey raises were considered and rejected on the merits on direct appeal. To raise such claims again, Mr. Bailey must show that the interests of justice require that they be reconsidered. *In re Lord*, 123 Wn.2d at 303. The first issue Mr. Bailey attempts to reargue is whether the trial court properly ordered the conspiracy sentence to run consecutively to the murder sentences.[2] Mr. Bailey argued on direct appeal that these crimes encompassed the "same criminal conduct" and therefore should be served concurrently, but the Court of Appeals held that, since all of crimes were "serious violent offenses," the trial court properly imposed consecutive sentences. *See* RCW 9.94A.589(1)(a), (b).[3] Mr. Bailey contends that the court erred in basing its decision solely on that fact that the crimes were "serious violent offenses," ignoring the question of whether they also arose "from separate and distinct criminal conduct." *See* RCW 9.94A.589(1)(b) (crimes to be served consecutively if they are "serious violent offenses arising from separate and distinct criminal conduct"). Mr. Bailey argues that this court has since made clear, in *State* v. *Tili*, 139 Wn.2d 107, 985 P.2d 365 (1999), that the question of "separate and distinct criminal conduct" is to be evaluated in light of the test for whether crimes "encompass the same criminal conduct" under RCW 9.94A.589(1)(b). Mr. Bailey urges that the conspiracy constituted the "same criminal conduct" as the murders and thus, under *Tili*, did not amount to "separate and distinct criminal conduct."

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[2] Mr. Bailey does not dispute that the court properly ran the murder sentences themselves consecutively.

[3] References here are to the current codifications of the sentencing statute, which in relevant respects are the same as those in effect when these crimes were committed.

Initially, Mr. Bailey contends that the Chief Judge erroneously determined that *Tili* did not constitute a "material change in the law" justifying reconsideration. *See In re Gentry,* 137 Wn.2d 378, 388, 972 P.2d 1250 (1999) (material change in law may justify reconsidering ground for relief raised on appeal). In particular, Mr. Bailey argues that the Chief Judge misapplied the rule that an appellate decision constitutes a "change in the law" only if it effectively overturns a prior appellate decision that was originally determinative of the issue. *See In re Greening,* 141 Wn.2d 687, 697, 9 P.3d 206 (2000). Mr. Bailey contends that this rule applies only to the statutory exception to the time limit on personal restraint petitions. *See* RCW 10.73.100(6). He argues that, since this court in *Tili* interpreted a statute for the first time, that decision may provide grounds for reconsidering an issue in the interests of justice. *See, e.g., In re Vandervlugt,* 120 Wn.2d 427, 432-35, 842 P.2d 950 (1992) (court reconsidered exceptional sentence in light of intervening decision first holding that future dangerousness is not a valid aggravating factor in nonsexual offenses).

But it is not necessary to decide that issue here, since even applying *Tili* the conspiracy did not constitute the "same criminal conduct" as the murders. For crimes to encompass the same criminal conduct, they must have been committed with the same objective criminal intent, at the same time and place, and against the same victim. RCW 9.94A.589(1)(a). Here, the evidence established that the conspiracy occurred at various locations over a period of days and hours leading up to the killings.

Thus, the conspiracy was not committed at the same time and place as the murders. Mr. Bailey relies on *State v. Deharo,* 136 Wn.2d 856, 966 P.2d 1269 (1998), where this court held that a conspiracy to deliver heroin constituted the same criminal conduct as possession of heroin with intent to deliver. But there the defendant conspired with a middleman at precisely the same time and place that he possessed the heroin he intended to deliver. *Deharo* is thus factually distinguishable from the present case. Unlike *Deharo,* this case does not involve a "'continuing, uninterrupted sequence of conduct.'" *Id.* at 858 (quoting *State v.* Porter, 133 Wn.2d 177, 185-86, 942 P.2d 974 (1997)). And contrary to Mr. Bailey's suggestion, *Deharo* does not stand for the proposition that a conspiracy is always the "same criminal conduct" as the consummated crime. Mr. Bailey therefore does not show that this issue should be reconsidered in the interests of justice.

Mr. Bailey next seeks to reargue his claim that the trial court admitted Youngblood's statement to the police without sufficiently redacting references implicating Mr. Bailey in the crimes. To protect a defendant's right of confrontation, a nontestifying codefendant's statement expressly implicating the defendant in the crime is generally inadmissible in a joint trial, even if the jury is instructed to consider the statement only against the codefendant. *Bruton v. United States,* 391 U.S. 123, 127-37, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968); *State v. St. Pierre,* 111 Wn.2d 105, 111-12, 759 P.2d 383 (1988). The statement may be admitted with a limiting instruction, however, if it is redacted to eliminate the defendant's name and any reference to his or her existence, even if the statement would be incriminating when linked to other evidence admitted at trial. *Richardson v. Marsh,* 481 U.S. 200, 211, 107 S. Ct. 1702, 95 L. Ed. 2d 176 (1987); *see* CrR 4.4(c)(1)(ii) (admission of codefendant's statement does not require severance if deletion of all references to defendant will eliminate prejudice to him).

In this case, purported references to Mr. Bailey were replaced with neutral pronouns such as "someone" and "they." The Supreme Court in *Richardson* expressed no opinion on whether this practice would cure the confrontation problem. *Richardson,* 481 U.S. at 211 n.5. But in numerous decisions since then, other courts have held that pronouns and other nonspecific terms are acceptable if they do not make obvious either that the statement was redacted or that the term used referred to or directly implicated the defendant. *See, e.g., United States v. Taylor,* 186 F.3d 1332, 1336-37 (11th Cir. 1999); *United States v. Verduzco-Martinez,* 186 F.3d 1208, 1214-15 (10th Cir. 1999); *United States v. Enriquez-Estrada,* 999 F.2d 1355, 1359 (9th Cir. 1993). On direct appeal, the Court of Appeals considered whether the redactions sufficiently neutralized Youngblood's statement and held that they did.

Mr. Bailey argues that a "material change in the law" occurred with the Supreme Court's decision in *Gray v. Maryland,* 523 U.S. 185, 118 S. Ct. 1151, 140 L. Ed. 2d 294 (1998). But the Court in *Gray* held only that obvious deletions, such as use of word "deleted" in place of the defendant's name, fall within the *Bruton* rule. *Id.* at 191-97. *Gray* announced no new rule; it simply applied the principles expressed in *Bruton* and *Richardson* to the facts of that case. *Gray* thus constituted no change in the law that would justify revisiting this issue in the interests of justice. The Chief Judge so determined, and Mr. Bailey demonstrates no obvious or probable error.

Nor, in any event, does *Gray* undermine the Court of Appeals decision on direct appeal. Overall, Youngblood's statement, as read to the jury, contains no obvious redactions nor any passages directly or inferentially implicating Mr. Bailey in the crimes. Nor is it evident from the statement that any of the pronouns are even meant to replace references to Mr. Bailey. Most of them seem to refer to "Juice" (Orlandis Campbell), who had been convicted in a separate proceeding. The statement is simply not so "powerfully incriminating," *Bruton*, 391 U.S. at 135, as to overcome the normal presumption that the jury followed the court's instruction to consider the statement only against Youngblood. *See United States v. Logan*, 210 F 3d 820 (8th Cir. 2000).

Continuing with this issue, Mr. Bailey argues that the prosecutor improperly used Youngblood's statement against him in argument to the jury. But the trial court denied a mistrial on this point, and the Court of Appeals on direct appeal held that the court did not abuse its discretion. Again, Mr. Bailey does not show that the interests of justice require reconsideration of this issue.

Mr. Bailey next argues that the trial court erred in excluding evidence that Leroy Smith was involved in the murders. He also contends that the court erroneously denied his motion for a new trial based on new information from Teresa and India Spates detailing statements and acts of Michael Oliver on the night of the murders. Further, Mr. Bailey urges that the State violated his due process rights by failing to disclose the whereabouts of Smith. But on direct appeal the Court of Appeals rejected all of these arguments on the merits. *See State v. Mak,* 105 Wn.2d 692, 716, 718 P.2d 407 (1986) (standards for admission of "other suspect" evidence); *State v. Williams,* 96 Wn.2d 215, 222-23, 634 P.2d 868 (1981) (standards for granting new trial based on newly discovered evidence); *Brady v. Maryland,* 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963) (obligations for disclosure of evidence). Mr. Bailey does not demonstrate that these issues should be reexamined in the interests of justice.

Mr. Bailey also appears to argue for the first time that the State committed a *Brady* violation by failing to disclose information it had, through Teresa Spates, about Michael Oliver's possible involvement in the crimes. But for a *Brady* violation to occur, the information must be "material" in the sense that there is a reasonable probability that the result of the proceeding would have been different had the evidence been disclosed. *State* v. *Benn,* 120 Wn.2d 631, 649, 845 P.2d 289 (1993). The trial court considered whether Teresa Spates's information would have changed the result when it considered Mr. Bailey's new trial motion.[4] It found no such reasonable probability, and the Court of Appeals affirmed on direct appeal. Mr. Bailey again does not show that the interests of justice require reconsideration of this matter.

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[4] Mr. Bailey based his motion on newly discovered evidence. But as with a *Brady* claim, a party claiming newly discovered evidence must show that the new evidence would probably change the outcome of the trial. *Williams,* 96 Wn.2d at 223.

Mr. Bailey attempts to resurrect the "other suspects" question as an ineffective assistance claim (based on counsel's failure to investigate other suspects). But a "new" issue is not raised by recasting a previously determined issue as an ineffective assistance claim. *In re Stenson;* 142 Wn.2d 710, 720, 16 P.3d 1 (2001). Mr. Bailey must therefore still show that the interests of justice require reconsideration of this issue. As I have concluded, he fails to make that showing. In any event, he demonstrates neither deficient representation nor prejudice. *McFarland,* 127 Wn.2d at 334-35.

Finally, Mr. Bailey argues that his appellate counsel was ineffective. But to prevail on this claim, Mr. Bailey must demonstrate the merits of legal issues that counsel either failed to raise or raised improperly, and then demonstrate actual prejudice. *Lord,* 123 Wn.2d at 314. Mr. Bailey does not make this showing.

In sum, the Chief Judge did not err in dismissing the personal restraint petition, nor are there any other grounds for review under RAP 13.5(b). Accordingly, the motion for discretionary review is denied.

/s/ Geoffrey Crooks

COMMISSIONER

March 28, 2003

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

In re the Personal Restraint Petition of ERNEST ALLEN BAILEY Petitioner.	No. 24481-1-II ORDER DISMISSING PETITION

Ernest Allen Bailey seeks relief from personal restraint imposed following his 1993 convictions of first degree murder (two counts) and conspiracy to commit first degree murder (one count). At a joint trial, a jury found Bailey and Eugene Youngblood guilty of murdering Arthur Randall and Tyrone Darcheville and conspiring to commit both murders.[5]

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[5] Bailey's and Youngblood's appeals were consolidated under cause No. 16832-4-II. This court affirmed their convictions and sentences in an unpublished opinion decision. *State v. Youngblood* and *Bailey*, Nos. 16832-4-II, 16833-2-II, 18871-6-II, 19048-6-II (Wash. Ct. App. Sept. 19, 1997) (hereinafter referenced as "No. 16832-4-II"). Bailey then filed a petition for review, which the Supreme Court denied. *State v. Bailey*, 134 Wn.2d 1016 (1998).

In this petition, Bailey contends that (1) the trial court violated his sixth amendment right to confrontation by admitting a redacted version of Youngblood's confession; (2) the trial court violated his due process right by excluding evidence that implicated another suspect, Leroy Smith; (3) the State withheld material, exculpatory evidence concerning Smith and Michael Oliver: (4) he received ineffective assistance of counsel by trial counsel's failure to conduct adequate pretrial investigation of Smith and Oliver; (5) he is entitled to a new trial based on newly discovered evidence; (6) the trial court violated his due process and sixth amendment rights by refusing to disclose the identity of a confidential informant who gave police information about the murders; and (7) the sentencing court erred in ordering his sentences to run consecutively to each other.

This petition is before this court for a second time. Previously, this court dismissed it as a successive petition under RCW 10.73- 140. agreeing with the State's contention that Bailey's postconviction CrR 7.8(b) motion to vacate judgment was a prior petition.[2]

Bailey then moved for discretionary review of the summary dismissal. The Supreme Court granted review and held that the petition was improperly dismissed under RCW 10.73.140, and remanded to this court for consideration as a *first* petition. *In re*

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[2] Bailey had filed a motion to vacate judgment and a motion for new trial; the trial court denied both motions. His appeals of these rulings were consolidated with his direct appeal.

Bailey, 141 Wn.2d 20, 22 (2000).

Standards of Review

To prevail in a request for collateral relief based on a constitutional challenge, petitioner must show actual and substantial prejudice resulting from the alleged violation. *In re Cook,* 114 Wn.2d 802,813 (1990). *See also In re Breedlove,* 138 Wn.2d 298,304 N.1 (1999). When the challenge is based on a nonconstitutional error, the required showing is stricter; the claimed error must constitute a fundamental defect which inherently results in a complete miscarriage of justice. *Breedlove,* at 304 n.1; *Cook,* at 813.

When a claim has previously been raised and resolved on its merits, petitioner must show that reexamination of the issue serves the ends of justice before it will be reconsidered. *In re Vandervlugt,* 120 Wn.2d 427,432 (1992). This burden can be met by showing an intervening change in the law. or some other justification for having failed to raise a crucial point or argument *In re Gentry,* 137 Wn.2d 378,388 (1999). But the claim cannot simply be a reiteration of an issue finally resolved at trial and on direct review, it should raise new points of fact and law that were not or could not have been raised before. *Id.*

NEW CLAIM

For the first time. Bailey claims that the trial court erred in refusing to disclose the identity of a confidential informant who had given police information about the murders. In a pretrial motion, he requested in the alternative disclosure of the informant's identity or an *in camera* hearing. The trial court denied the request for disclosure but conducted an *in camera* hearing in which it questioned the detective who had interviewed the informant. The court ruled that the information provided by the informant to the detective was "entirely inculpatory" and denied the request to disclose. Report of Proceedings (Vol. VI - Trial), at 511-12.[3]

Disclosure of an informant's identity is not required unless the failure to disclose infringes upon the defendant's constitutional rights. *State* v. *Fredrick*, 45 Wn. App. 916, 919 (1986). The sixth amendment guarantees the right to compel witnesses who are material to the accused's defense. *State* v. *Smith*, 101 Wn.2d 36, 41 (1984). The defendant bears the burden of showing materiality.

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[3] The court stated:

> Last Friday I held an in camera hearing in regard [to] a confidential informant. As indicated, the in camera - the person who appeared at the in camera hearing was Detective Andy Oakley of the Bremerton Police Department who had interviewed this person. I heard the testimony, I've reviewed it in my own mind this weekend. The upshot of all the information is it's entirely inculpatory and I will not - I'm not ordering that the confidential informant be disclosed. It does not appear to me that any of the confidential informant[']s information was utilized in regard [to] the investigation of these offenses. A record was maintained and will remain sealed for further review, if necessary.

Id.

Id

Where the informant's identity or the contents of the informant's communications is "relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause, the privilege must give way." *Roviaro* v. *United States,* 353 U.S. 53, 60-61 (1957). When there is a conflict between the defendant's right and the State's need to protect the informant, then holding an *in camera* session where the judge hears the informant's testimony is the approved procedure for resolving such conflict. *State v. Smith* 101 Wn.2d 36, 44 (1984) (citing *Harris,* at 150). After hearing the informant's testimony, the judge must decide whether to compel disclosure. *Harris.* 91 Wn.2d at 150.

Bailey complains that the *in camera* hearing was inadequate because the trial court only questioned the detective and not the confidential informant who, according to the prosecutor, was unavailable for the hearing. He argues that the trial court erred by not conducting an *in camera* hearing with the informant. But an *in camera* hearing is necessary only when the defendant makes the initial showing that the confidential informant may have evidence that would be relevant. *Frederick,* 45 Wn. App. at 920 Bailey did not make a factual showing that such hearing would likely disclose evidence relevant and helpful to his defense. As he acknowledges in his petition, his attorney merely "noted that the informant might have information that could help the defense:' Petition, at 67. Mere speculation as to the informant's testimony is insufficient for a hearing. *Fredrick,* 45 Wn. App. at 920. Absent a factual showing of materiality, the trial court did not abuse its discretion in denying an *in camera* hearing to directly question the informant. *State v. Read,* 51 Wn. App. 597, 606-07 (1988).

Bailey also complains that trial court f8iled to give his counsel the opportunity to ask or submit questions for the detective. Petition, at 71. This argument is meritless because defense counsel knew about the *in camera* hearing but apparently chose not to submit questions. *See* Petition, at 67. Nor did counsel make any post-hearing objections to how the court conducted the hearing. Bailey cannot be heard to complain now.

Further, his alternate claim of ineffective assistance of counsel lacks merit. To prevail on a claim of ineffective counsel, he must make a two-prong showing: (1) deficient performance, and (2) resulting prejudice. *Strickland v. Washington,* 466 U.S. 668,687 (1984). As Bailey acknowledges, he cannot show prejudice flowing from defense counsel's alleged omissions concerning the hearing. Petition, at 71-72. Thus, the ineffective counsel claim fails. *See In re Lord.* 117 Wn.2d 829.884 (1991) (lack of prejudice defeats an ineffective counsel claim).

Bailey has moved this court to unseal the transcripts of the *in camera* hearing with the detective.[4] He argues that this "would permit more meaningful argument concerning whether [the trial judge] inquired into all relevant matters, and whether the information provided by Detective Oakley would have been relevant and helpful to the defense." Petition, at 70. He has not shown compelling circumstances to justify unsealing; the motion is denied. GR 15(d)(I) ("records sealed shall be ordered unsealed only upon proof of compelling circumstances").

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[4] Petition, at 69; Petitioner's "Motion For Court To Consider Record From Direct Appeals. And To Disclose Sealed Portion Of Transcripts." This court grants the motion to consider the record from Bailey's appeal but denies the motion to unseal the sealed transcripts.

Recognizing Bailey's difficulty in challenging the trial court's ruling without access to the record," this court has carefully scrutinized the scaled transcripts and find that it supports the court's determination.

Previously Adjudicated Claims

Bruton Violation (Claim #1)

Bailey claims that the trial court erred by admitting a redacted version of Youngblood's custodial statement in violation of his sixth amendment right to confrontation and the *Bruton* rule. Youngblood's confession was redacted so that all references to Bailey were replaced with neutral pronouns such as "'someone' Or 'he or they.'" No. 16833-2-II, at 17. This court had considered and rejected Bailey's challenge to the admission of Youngblood's confession. *Id.*, at 16-17. He now seeks reconsideration based on *Gray v. Maryland*, 523 U.S. 185 (1998), which he contends is a significant change in the law concerning the *Bruton* rule.

In *Bruton* v. *United States*. 391 U.S. 123. 135-36 (1968), the United States Supreme Court held that admission of a nontestifying codefendant's confession at a joint trial violates the defendant's sixth amendment right to confrontation, even if the jury received instructions to consider the confession only against the codefendant. The Supreme Court narrowed this rule in *Richardson v. Marsh,* 481 U.S. 200, 211 (1987). There, it held that there is no confrontation right violation if the codefendant's confession is redacted to eliminate the defendant's name and reference to his or her existence. *Richardson,* 481 U.S. at 211. The *Richardson* court explained that although the defendant was linked to the statement by other properly admitted evidence, it was not incriminating on its face and thus did not violate *Bruton,* 481 U.S. at 208. Here, this court relied on *Richardson* to reject Bailey's *Bruton* argument, holding that admission of Youngblood's confession did not prejudice him No. 16833-2-II, at 17.

Then, while Bailey's petition for review was pending, the United States Supreme Court decided *Gray v. Maryland,* 523 U.S. 185 (1998). *Gray* held that *Bruton's* protective rule applies to a redacted confession which references the defendant with obvious indications of alteration, such as blank space or the word "deleted." *Gray, 523* U.S. at 193-97. The court reasoned that removal of the defendant's name in this manner had the effect of directly referencing the defendant's existence and, thus, "so closely resemble *Bruton's* unredacted statements that . ' .. the law must require the same result." *Gray.* 523 U.S. at 192.

Bailey contends that the holding in *Gray* constitutes a significant change in the law for purposes of overcoming the procedural bar against relitigating a previously considered claim. The State disagrees and argues that *Gray* did not establish new or different law but merely applied the *Bruton* rule. Response, at 13. The State is correct. Though *Gray* refined the scope of the *Bruton* rule, it did not effectively overturn a prior appellate decision and, thus, did not constitute a significant change in the law. See *In re Greening*. 141 Wn.2d 687. 697 (2000) (clarifying that "significant change in the law" means "an intervening opinion [that] has effectively overturned a prior appellate decision that was originally determinative of a material issue").

Even if *Gray* constitutes a significant change in the law and this court were to reach the merits of Bailey's claim, it would fail. Recently, in *State* v. *Larry,* 108 Wn. App. 894, (2001), this court addressed a *Bruton* claim in light of *Gray*. *Larry* involved a codefendant's statement that was redacted by substituting the phrase "the driver" for the defendant's name. *Larry,* 108 Wn. App. at 906. This court found that such redaction did not violate *Bruton* and further noted that the redaction mirrored the format approved in *Gray*. *Larry,* 108 Wn. App. at 907.[5] Similarly, the redaction here-using neutral pronouns "someone," "be" and "they"- did not violate the *Bruton* rule as clarified in *Gray. Larry,* 108 Wo.. App. at 905-06.[6]

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[5] The *Larry* court observed:

> The Court in *Gray* would have upheld admission of the redacted confession had it read "[m]e and a few other guys" committed the crime, instead of [m]e, deleted, deleted, and a few other guys." *Gray*, 523 U.S. at 196-97. [Codefendant's] redacted statement, which refers to a third person, not a blank, mirrors the redaction format that the Supreme Court approved in *Gray*, in spite of the jury's ability to infer that such third person was the unnamed defendant.

Larry, 108 Wn. App. at 907.

Exclusion of Other Suspect Evidence (Claim #2)

On appeal, this court rejected Bailey's claim that the trial court erred by excluding evidence which might have implicated a third party, Leroy Smith. No. 16832-4-II, at 21-23. This court affirmed the trial court's ruling because Bailey failed to make the proper showing for admission of other suspect evidence. *Id* at 23. 'Though. Bailey's proferred evidence established Smith's alleged presence at the crime scene, he did not show that Smith had taken any step to act on an intent to commit the crime. *Id.* at 23.

Bailey renews his challenge to the trial court's exclusion of other suspect evidence by claiming ineffective assistance of appellate counsel. Petition, at 59-60. To succeed on a claim of ineffective assistance of appellate counsel, he must show that (1) the legal issue which appellate counsel tailed to raise had merit, and (2) he was actually prejudiced by the failure to raise it. *In re Maxwell,* 133 Wn.2d 322,344 (1997).

Bailey faults his appellate attorney for not challenging the trial court's ruling on federal due process grounds. Petition, at 59. But he cannot show that, had counsel done so, there is a reasonable probability of a different outcome on appeal. This court held that the trial court properly excluded evidence relating to Smith because Bailey's offer of proof was insufficient to establish the proper foundation connecting Smith with the murders. No. 16832-4-II, at 21-23. An argument on due process grounds would not have affected this court's resolution of the issue.[7] Thus, failing to show prejudice from the alleged omission, his ineffective counsel claim does not satisfy the "ends of justice" requirement to reopen the issue.

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[6] *See also United States v. Logan*, 210 F.3d 820, 822-23 (8th Cir. 2000) (redaction with the term "another individual" did not violate *Bruton*); *United States v. Taylor*, 186 F.3d 1332, 1335-37 (11th Cir. 1999) (use of the terms "they" and "captain" did not violate *Bruton*).

Brady Violation (Claims #3, #4, #5

Bailey claims that the State violated *Brady v. Maryland*, 373 U.S. 85, 87 (1963), by withholding material, exculpatory evidence relating to third party suspects, Oliver and Smith. Petition, at 61-63. This court previously rejected this claim, holding that Bailey failed to show the sought-after evidence was material to his defense. No. 16832-4-II, at 23-25. He seeks reconsideration but does not make any new points of law or fact to warrant reexamination. Further, his assertions of ineffective assistance of counsel and newly discovered evidence also fails to justify reexamination; they are no more than mere reiterations of the same arguments made before this court.

Consecutive Sentences (Claim #7)

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[7] *Compare*, *Maxwell*, 133 Wn.2d 322 (granting relief; holding personal restraint petitioners satisfied *Strickland's* two-part test by appellate counsel's failure to brief *Gunwall* factors in a search and seizure challenge on state constitutional grounds.

Bailey argues that the sentencing court erred by imposing consecutive rather than concurrent sentences because it misapplied RCW 9.94A.400(1)(b). Under this statute, when there are two or more serious violent offenses "arising from separate and distinct criminal conduct," the sentences are to be served consecutively. RCW 9.94A.400(1)(b). This court rejected his sentencing challenge on appeal, holding that because his crimes were classified as serious violent offenses, RCW 9.94A.400(1)(b) required consecutive sentences. No. 16832-4-1I. at 11-13, 23. Bailey urges reexamination of the issue because: (1) his appellate counsel's briefing was "ineffective" and "may have misled" this court, and (2) the Supreme Court's intervening decisions in *State v. Tili,* 139 Wn.2d 107 (1999), and *State* v. *Deharo,* 136 Wn.2d 856 (1998), support his argument. Petition. at 79; Reply, at 39.

Bailey's claim rests on the proposition that the filctors used to define "same criminal conduct" under subsection (1)(a) of RCW 9.94A400 should be used to determine whether two or more offenses are "separate and distinct" under subsection (l)(b). Petition at 73-74. He further argues that, applying the same criminal conduct analysis to his crimes, the conspiracy conviction should not have been considered separately from the murder convictions. Petition at 74-75.

His reasons for revisiting the sentencing claim are unpersuasive. First, the argument that he makes now had already been considered by this court. As with Bailey, the trial court had sentenced Youngblood to consecutive sentences. No. 16832-4, at 11. Though Bailey's appellate attorney did not argue that the same criminal conduct analysis should apply, Youngblood's counsel did and devoted seven pages in the opening brief to this argument. Brief of Appellant Youngblood, at 104-111. Second, contrary to Bailey's assertion, *Tili* and *Deharo* do not represent a significant change in the law regarding RCW 9.94A.400(1)(b). Neither case overturned a prior decision. *See In re Stoudmire*, 145 Wn.2d 258, 264 (2001) ("'significant change in the law" means an intervening opinion that effectively overturned a prior appellate decision); *Greening*, 141 Wn.2d at 697. Thus. Bailey has not shown. that revisiting his sentencing claim serves the ends of justice.

Conclusion

Bailey has not provided any reasons to reexamine issues that this court previously resolved on direct review. Moreover, he has not shown the existence of a new issue implicating actual or substantial prejudice to constitutional rights or fundamental errors of law. Accordingly, it is hereby

ORDERED that this petition is dismissed under RAP 16.11(b).

DATED this 29 day of March, 2002.

/s/

Chief Judge

cc: Ernest Allen Bailey

~~Kitsap~~ County Clerk

County Cause No. 91-1-00823-8

John J. Samson

David B. Zuckerman

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON DIVISION II

STATE OF WASHINGTON, Respondent, v. EUGENE JAYSON YOUNGBLOOD a/k/a "C-BOY," Appellant.	No. 16832-4-II consolidated with No. 16833-2-II No. 18871-6-II No. 19048-6-II UNPUBLISHED OPINION
STATE OF WASHINGTON, Respondent, v. ERNEST ALLEN BAILEY a/k/a "LITTLE BEAR," Defendant.	Filed: Sep 19 1997

HOUGHTON, C.J. – Eugene Youngblood and Ernest Bailey appeal from their convictions of first degree murder and conspiracy to commit first degree murder. We affirm.

FACTS

Youngblood and Bailey are youth gang

members from the Bremerton area. They moved to Bremerton from Los Angeles where they were members of the Mansfield Gangster Crips. Orlandis Donte Campbell, a close friend who was previously convicted in connection with these murders, was a member of the Santana Blocc Crips. The victims, Darcheville and Randall, were members of the Acacia Blocc of the Compton Crips.

Apparently, Lewis Davis, who allegedly operated a crack house, had customers who preferred the crack cocaine provided by Randall and Darcheville. In December 1991, an argument occurred at Davis's house among Darcheville, Bailey, and Campbell, and various threats were exchanged.

A few weeks later, on December 19, 1991, Bailey, Youngblood, and Campbell were overheard making threats of revenge against Darcheville and Randall. Bailey, Youngblood, and Campbell later went to a Tacoma apartment to pick up some clothes, and there, Bailey told a friend that somebody was about to get shot. Later that evening, Bailey, Youngblood, and Campbell went to the home of Bailey's girlfriend, Lovetta Porchia where the parties talked about obtaining bullets.

The following afternoon, Curtis Nelson saw Youngblood and Bailey talking with Randall and Darcheville. At that time, Youngblood had a revolver in his pocket. Later that afternoon, Bailey, Youngblood, and Campbell, dressed entirely in black, arrived in Youngblood's car at the home of Campbell's girlfriend, Pamela Williams. Campbell asked Pamela where Darcheville was and when he would return.

At that time, Randall and Darcheville were at the apartment of Comalita and Emmonuela Ray where Randall later received a page from Campbell. After Randall and Campbell spoke on the phone, Randall threw down the phone as if he were angry.

Bailey and Campbell later went to the Rays' apartment looking for Randall, and waited there for several hours. Randall and Darcheville arrived around 6:45 P.M. At 7:00 P.M., Randall, Darcheville, Bailey, and Campbell left to go to the home of Rebecca Shelton.

Samantha Olmsted, Shelton's neighbor, testified that she saw four or five people arguing loudly outside Shelton's home around 7:00 P.M. Olmsted later identified Bailey as one of the people arguing outside Shelton's home. Olmsted testified that shortly afterwards, she heard a series of noises, which she first thought was a car backfiring.

Around 7:00 P.M., Jerry Bouldwin and Daetra Adams stopped by Shelton's house. Bouldwin and Adams went inside and found the bodies of Randall and Darcheville. Randall had been shot through the head, and Darcheville had been shot three times in the chest and face. Bouldwin called the police.

Between 7:00 and 8:00 P.M., Bailey, Youngblood, and Campbell returned to Davis's home. All three were acting "hyper." They left a short time later. Around 8:30 P.M., Youngblood called his girlfriend, Karla Beckham, and asked her to pick up some of his clothes. When Youngblood arrived at Beckham's home, he was "kind of in a rush," and told her he was getting ready to go to Los Angeles.

In late December 1991, Bailey, Youngblood, and Campbell were charged with the murders of Darcheville and Randall. On December 27, 1991, Youngblood was arrested in Los Angeles. Youngblood was brought back to Washington, where he gave a tape recorded statement/confession to Detective Oakley of the Bremerton Police Department. A redacted version of the statement was later admitted at trial.

On July 31, 1992, the FBI located Bailey at an apartment in Los Angeles. After being arrested and jailed, Bailey told his cellmate, Orlands Lomax, that he had thrown a .357 magnum off the Tacoma Narrows Bridge. Bailey asked other cellmates to implicate other people in the murders and he offered $20,000 to anyone who would help acquit him.

Youngblood and Campbell were tried together. Campbell was convicted, but the jury could not reach a verdict for Youngblood. Youngblood was eventually re-tried along with Bailey. Both Bailey and Youngblood were then convicted of murder in the first degree (two counts) and conspiracy to commit murder in the first degree.

At sentencing, Bailey and Youngblood argued that the conspiracy and murder convictions should be considered the "same criminal conduct" and, as such, the sentences should run concurrently rather than consecutively. The trial court found that the offenses did not encompass the "same criminal conduct" and ordered that Youngblood and Bailey serve consecutive sentences.

On January 19, 1994, Youngblood filed a motion with the trial court seeking vacation of the conviction under CrR 7.8.(b).[1] The trial court dismissed the motion, stating that Youngblood's attorney was not acting with proper authority when the motion was filed. The trial court also ruled that the motion was untimely and did not meet the procedural requirements for a CrR 7.8 motion.

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[1] CrR 7.8(b) states:

> **Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud; etc.** On motion and upon such terms as are just, the court may relieve a party from a final judgment, order or proceeding for the following reasons:
>
> (1) Mistakes, inadvertence, surprise, excusable neglect or irregularity in obtaining a judgment or order;
>
> (2) Newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under rule 7.6;
>
> (3) Fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;
>
> (4) The judgment is void; or
>
> (5) Any other reason justifying relief form the operation of the judgment.
>
> The motion shall be made within a reasonable time and for reasons (1) and (2) not more than 1 year after the judgment, order or proceeding was entered or taken, and is further subject to RCW 10.73.090, .100, .130, and .140. A motion under section (b) does not affect the finality of the judgment or suspend its operation.

On January 7, 1994, Bailey filed a motion for a new trial. Bailey based his motion upon new information gathered by investigators, who alleged that the State had known Leroy Smith's location and did not disclose it. Bailey also presented a statement from Theresa Spates that implicated Smith and Mike Oliver in the murders. The trial court denied Bailey's new trial motion.

ANALYSIS

I. YOUNGBLOOD'S APPEAL

A. Speedy Trial

Youngblood first contends that he was denied his constitutional right to a speedy trial. Youngblood asserts that under CrR 3.3(d)(3)[2] his trial should have commenced by September 11, 1991. Instead, the trial commenced on October 5, 1991, 24 days after the expiration of the speedy trial period. In setting the trial date, the trial court determined that Youngblood would not be substantially prejudiced by the delay. Youngblood asserts that the trial court should have severed the trials in order to preserve his right to a speedy trial and erred in denying his motion for dismissal with prejudice pursuant to CrR 3.3(h)(2)(i).

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[2] CrR 3.3(d)(3) states:

> *Mistrial and New Trial.* If before verdict the superior court orders a mistrial, the defendant shall be brought to trial not later than 60 days after the oral order of the court if the defendant is thereafter detained in jail or not later than 90 days after the oral order if the defendant is not detained in jail and whether or not the defendant is subjected to conditions of release. If after verdict the superior court orders a new trial, the defendant shall be brought to trial not later than 60 days after entry of the written order of the court if the defendant is thereafter detained in jail, or not later than 90 days after entry of such written order if the defendant is not detained in jail and whether or not the defendant is thereafter subjected to conditions of release.

A trial court's denial of a motion for severance will not be reversed absent a manifest abuse of discretion. *State* v. *Dent,* 123 Wn.2d 467, 484, 869 P.2d 392 (1994). Severence is required when it is necessary to protect a defendant's rights to a speedy trial, but separate trials are generally disfavored in Washington. *Dent,* 123 Wn.2d at 467. The trial court may grant a continuance that briefly delays a trial beyond a defendant's speedy trial period where the administration of justice requires it and the defendant will not be substantially prejudiced in the presentation of his or her defense. CrR 3.3(h)(2); *State* v. *McKinzy,* 72 Wn. App. 85, 89, 863 P.2d 594 (1993).

Continuing a joint trial beyond one codefendant's speedy trial period rather than severing the trial is permitted. *Dent,* 123 Wn.2d at 484-85; *State* v. *Melton,* 63 Wn. App. 63, 67, 817 P.2d 413 (1991). Here, the trial was continued beyond Youngblood's speedy trial expiration date in order to allow Bailey's counsel extra time to prepare.

The trial court denied Youngblood's motion for severance because "the defendants have not demonstrated that a joint trial would be so manifestly prejudicial as to outweigh the concern for judicial economy." Youngblood fails to demonstrate that the 24-day delay of the trial prejudiced his ability to present a defense. Accordingly, there was no abuse of discretion in denying his motion for severence based upon speedy trial concerns.

B. Redacted Statement

Alternatively, Youngblood contends that he was irreparably prejudiced by the admission of a redacted version of his statement to the police because it distorted his version of the events and did not contain exculpatory information. Youngblood sought to sever the trials because his statement to the police inculpated Bailey. The trial court ordered the statement redacted so that all express references to Bailey were removed.[3] When a redacted statement of a codefendant is at issue, we review the denial of a motion for severance for manifest abuse of discretion. *State* v. *Alsup,* 75 Wn. App. 128, 131, 876 P.2d 935 (1994).

Thus, in order to support a finding that the trial court abused its discretion, the defendant must be able to point to specific prejudice. Youngblood asserts that he was unduly prejudiced by the joint trial proceedings because the redacted statement: (1) violated the "rule of completeness"; (2) unfairly distorted the meaning of the statement; and (3) penalized him for refusing to testify.

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[3] Redaction was required here to protect Bailey's Confrontation Clause rights and to permit a Joint trial. *Bruton* v. *United States,* 391 U.S. 123, 137, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968); *State* v. *Vannoy,* 25 Wn. App. 464, 472,610 P.2d 380 (1980); CrR 4.4(c)(1)(ii).

The "rule of completeness" embodied in ER 106 permits a party to introduce the balance of a recorded statement once part of the recorded statement has been introduced into evidence.[4] *Alsup*, 75 Wn. App. at 133. The rule of completeness is violated, and severance is required, only where admission of the redacted statement distorts the meaning of the statement or excludes information which is "substantially exculpatory" to the defendant. *Alsup*, 75 Wn. App. at 133.

The trial court concluded that the redacted version of Youngblood's statement was "significantly more exculpatory of the defendant Youngblood than the original unredacted version. Certainly there is no distortion of the meaning of the statement, nor is there any exclusion of information which is substantially exculpatory of the defendant Youngblood." Our review of the redacted and unredacted statements discloses that the trial court properly concluded the redacted statement did not unduly prejudice Youngblood. There was no abuse of discretion in admitting the redacted statement and in refusing to grant Youngblood's motion for severence.

C. Evidence of Gang Affiliation

Youngblood next contends that the trial court erred in failing to exclude evidence of his membership in a gang. Evidence of other crimes or bad acts is admissible to show motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake. ER 404(b).

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[4] "When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the party at that time to introduce any other part, or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it." ER 106.

We review the admission of 404(b) evidence for abuse of discretion. *State* v. *Campbell*, 78 Wn. App. 813, 821, 901 P.2d 1050, *review denied*, 128 Wn.2d 1004 (1995). In applying ER 404(b), a trial court must: (1) determine the purpose for which the evidence is offered; (2) determine the relevance of the evidence, i.e., whether the purpose for which the evidence is offered is of consequence to the outcome of the action and tends to make the existence of an identified fact more probable; and (3) balance on the record the probative value of the evidence against its prejudicial effect. *Campbell*, 78 Wn. App. at 821.

In *Campbell*, we held that evidence of the defendant's gang membership was admissible under ER 404(b) where the State's theory of the case was that the alleged murder was in response to invasions of drug sales territory. *Campbell*, 78 Wn. App. at 821-22. We find, likewise, that evidence of Youngblood's gang membership was relevant to the State's theory of the case and that its relevance outweighed the potential for prejudice. *Campbell*, 78 Wn. App. at 821-22. Accordingly, there was no abuse of discretion.

D. Defective Information

Youngblood next contends that Count 1 of the second amended information (Information) was constitutionally defective. The Information charged Youngblood with criminal conspiracy, providing in relevant part:

They, the said Ernest Allen Bailey, a/k/a "Little Bear" and Orlandis Dante Campbell, a/k/a "Juice" and Eugene Jayson Youngblood, a/k/a "C-Boy", in the County of Kitsap, State of Washington, on or about or during :the month of December, 1991, did agree with one or both of the others or with one or more other persons to engage in or cause the commission of a first degree murder and anyone of those persons took a substantial step in pursuance of such agreement; contrary to the Revised Code of Washington 9A.28.040 and 9A.32.030.

Youngblood asserts that the Information is defective because: (1) it failed to allege the intent or "mens rea" for the offense charged; and (2) it failed to set out specific facts supporting each element of the alleged offense.

When a defendant challenges the information for the first time appeal, the appellate court must determine:

(1) do the necessary elements appear in any form, or by fair construction can they be found, in the information; and, if so, (2) can the defendant show he or she was nonetheless actually prejudiced by the inartfullanguage which caused a lack of notice.

State v. *Tunney,* 129 Wn.2d 336, 340, 917 P.2d 95 (1996) (citing *State* v. *Kjorsvik,* 117 Wn.2d 93,97,812 P.2d 86 (1991)).

Youngblood first asserts that the Information was defective because "intent" was not specifically alleged. We disagree. The element of intent can reasonably be construed from the language. *Tunney,* 129 Wn.2d at 340. Youngblood could not have entered into an agreement to commit the murders without necessarily intending to commit the murders. Further, Youngblood fails to demonstrate that he suffered any prejudice. We hold that the Information was sufficient. *Tunney,* 129 Wn.2d at 340-42.

Youngblood also contends that the Information failed to set forth specific facts that supported each element of the charged offense. Generally, an information must allege facts supporting every element of the offense in addition to adequately identifying the crime charged. *State* v. *Leach,* 113 Wn.2d 679, 689, 782 P.2d 552 (1989). A defendant is not entitled to challenge the factual sufficiency of an information for the first time on appeal if the defendant failed to request a bill of particulars at an earlier time. *State* v. *Holt,* 104 Wn.2d 315, 320, 704 P.2d 1189 (1985). Here, Youngblood did not request a bill of particulars before the trial court, and thus, he cannot now argue that the Information was factually unclear.

E. Sufficiency of the Evidence

Youngblood next contends that there was insufficient evidence to support his conviction for conspiracy. In reviewing challenges to sufficiency of evidence, an appellate court determines, after viewing the evidence in a light most favorable to the State, whether any rational trier of fact could find guilt beyond a reasonable doubt. *State* v. *Salinas,* 119 Wn.2d 192,201, 829 P.2d 1068 (1992). A claim of insufficient evidence admits the truth of the State's evidence. *State* v. *Pacheco,* 70 Wn. App. 27, 38-39, 851 P.2d 734 (1993), *rev'd on other grounds,* 125

Wn.2d 150 (1994). All reasonable inferences from the evidence must be drawn in favor of the State. *Salinas*, 119 Wn.2d at 201.

RCW 9A.28.040(I) provides:

A person is guilty of criminal conspiracy when, with intent that conduct constituting a crime be performed he agrees with one or more persons to engage in or cause the performance of such conduct, and anyone of them takes a substantial step in pursuance of such agreement.

An agreement can be shown by a "concert of action, all the parties working together understandingly, with a single design for the accomplishment of a common purpose." *State* v. *Casarez-Gastelum,* 48 Wn. App. 112, 116, 738 P.2d 303 (1987) (quoting *Marino v. United States,* 91 F.2d *691, 693-98,113* A.L.R. 975 (9th Cir. *1937)).*

Here, the State introduced evidence that Youngblood, not only drove Campbell and Bailey as they procured weapons and sought out the victims, but also spoke openly about committing violent acts against the victims. There is sufficient evidence supporting the jury's conclusion that Youngblood participated in the conspiracy.

F. Consecutive Sentences

Finally, Youngblood contends the trial court erred in finding that the conspiracy conviction and the murder convictions did not encompass the "same criminal conduct," and, therefore, sentencing Youngblood to consecutive rather than concurrent sentences.

The relevant sentencing criteria are provided in the Sentencing Reform Act:

> Whenever a person is convicted of two or more serious violent offenses, as defined in RCW 9.94A.030, arising from separate and distinct criminal conduct, the sentence range for the offense with the highest seriousness level under RCW 9.94A.320 shall be determined using the offender's prior convictions and other current convictions that are not serious violent offenses in the offender score and the sentence range for other serious violent offenses shall be determined using an offender score of zero. The sentence range for any offenses that are not serious violent offenses shall be determined according to (a) of this subsection. All sentences imposed under (b) of this subsection shall be served consecutively to each other and concurrently with sentences imposed under (a) of this subsection.

RCW 9.94A.400(1)(b).

RCW 9.94A.400(1)(b) provides a narrow exception to the general policy that sentences for all current convictions are served concurrently. The provision is designed to increase significantly the punishment for certain multiple violent offenders. DAVID BOERNER, SENTENCING IN WASHINGTON, §5.8(b), at 5-19 - 5-20 (1985). When the provision is applicable, the sentence range for each "serious violent" offense is determined independently of all other current convictions. BOERNER, §5.8(b), at 5-19. The sentences for each "serious violent" offense are then served consecutively. This result is consistent with the purposes and the legislative intent of the statutory provision, i.e., to avoid the possibility of concurrent sentences in cases of violent offenses where there were separate victims or questions of merger, and this result was clearly intended by the Legislature.[5] BOERNER, §5.8(b), at 5-18 - 5-20.

Youngblood was convicted of three crimes in this case: (1) the murder of Randall; (2) the murder of Darcheville; and (3) conspiracy to commit both murders. First Degree Murder and Conspiracy to commit First Degree Murder are each classified as serious violent offenses. RCW 9.94A.030(31)(a). Thus, Youngblood's convictions are statutorily mandated to be served consecutively.

Youngblood's argument endorses the concept that a party should not be punished separately for the criminal act and the conspiracy to commit that criminal act. Conspiracy is an evil in itself, independent of any other evil it seeks to accomplish. *Ianelli* v. *United States*, 420 U.S. 770, 779, 95 S. Ct. 1284,43 1. Ed. 2d 616 (1975). The statute unambiguously states that sentences for first degree murder and conspiracy to commit first degree murder are to be served consecutively. Unambiguous statutory· language is not subject to judicial interpretation. *State* v. *Michaelson*, 124 Wn.2d 364,366, 878 P.2d 1206 (1994).

In sum, Youngblood was properly sentenced to consecutive terms for each independent serious violent criminal act. The sentence is affirmed.

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[5] This "evidence of clear legislative intent" precludes application of the "rule of lenity," which prevents interpretation of a statute so as to increase the penalty imposed absent clear evidence of legislative intent to do so. *State v. Workman*, 90 Wn.2d 443, 454,584 P.2d 382 (1978).

G. Motion to Dismiss

In his supplemental brief, Youngblood argues the trial court erred in dismissing his motion to vacate the judgment. The trial court dismissed the motion for the following three reasons: (1) Youngblood did not have an attorney to represent him in the post-conviction proceedings, such that Youngblood did not personally ratify the motion and his attorney did not have the authority to bring the motion; (2) the motion was filed more than one year after the judgment and sentence were entered; and (3) the motion did not meet the procedural requirements of CrR 7.8.

The State concedes the trial court erred in ruling the motion was untimely. An order granting or denying a motion to vacate a judgment is an appealable order. RAP 2.2(a)(10). Here, however, the motion was dismissed without prejudice for failure to follow the procedural requirements of CrR 7.8 and for failure to show that Youngblood's counsel had proper authority to bring the motion.[6]

A dismissal without prejudice is not an appealable order when the dismissal neither determines nor discontinues the action. *Munden* v. *Hazelrigg*, 105 Wn.2d 39, 43, 711 P.2d 295 (1985).

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[6] An attorney must have express authority to represent an alleged client in order to appear on his or her behalf. *See, Vincent* v. *Vincent*, 16 Wn. App. 213,219,554 P.2d 374 (1976); *Grossman* v. *Will*, 10 Wn. App. 141, 149, 516 P.2d 1063 (1973); 7 AM. JUR. 2D *Attorney General* §143 (1980). If an attorney fails to show sufficient authority for instituting the action, the court may dismiss the action without prejudice. 7A C.J.S. *Attorney and Client* § 178 (1980).

Thus, we decline to address this issue at this time.

II. BAILEY'S APPEAL

A. Severance

Bailey first contends the trial court erred by refusing to sever the trials, contending he was prejudiced by: (1) lack of adequate preparation time; (2) antagonistic defenses; (3) the admission of Youngblood's redacted statement; and (4) the admission of other evidence against Youngblood.

1. Inadequate Preparation Time

Bailey asserts that because the trial court denied his motion for severence, his counsel did not have adequate time to prepare for trial. Bailey points out that he was willing to waive his right to a speedy trial in order to have the trial continued, but the trial court refused to continue the trial too far beyond Youngblood's speedy trial expiration date. The constitutional right to have the assistance of counsel carries with it a reasonable time for consultation and preparation. *State* v. *Barker,* 35 Wn. App. 388, 396, 667 P.2d 108 (1983). In determining what constitutes a reasonable time, each case must be examined individually to determine whether the defendant has been given sufficient time for effective legal representation. *Barker,* 35 Wn. App. at 396.

Here, Bailey was represented by two attorneys at trial, one of which was appointed in August and the other appointed approximately one week later. These attorneys spent two months preparing for trial. A new attorney was appointed on October 5, the day before jury selection began, after one of

Bailey's attorneys withdrew due to a conflict of interest. The new attorney told the court that he was comfortable with the appointment because testimony was not to begin for another two weeks. The trial began three weeks later on October 27.

Because Bailey's original counsel had two months preparation time, and because the new counsel stated that he was comfortable with the appointment, Bailey has not demonstrated that he was prejudiced. Thus, the trial court did not abuse its discretion in denying the motion for a continuance.

2. Antagonistic Defenses

Bailey next asserts the trial court should have severed the trials because his and Youngblood's defenses were so antagonistic to each other that it denied him a fair trial. In order to prevail, Bailey must demonstrate specific prejudice. *McKinzy*, 72 Wn. App. at 89. Antagonistic defenses do not justify severance unless they are irreconcilable, i.e., mutually exclusive to the extent that one must be disbelieved if another is to be believed. *State* v. *Lane,* 56 Wn. App. 286, 298, 786 P.2d 277 (1989).

The U.S. Supreme Court has held that co-defendants are not entitled to severance merely because they may have a better chance of acquittal in separate trials. *Zafiro* v. *United States,* 506 U.S. 534, 540, 113 S. Ct. 933, 122 L. Ed. 2d 317 (1993). Thus, when two co-defendants accuse each other of committing the crime, that alone does not establish prejudice per se. *Zafiro,* 506 U.S. at 540.

In the present case, both Youngblood and

Bailey denied participation in the murders. Because it would be possible to conclude that neither committed the murders, the defenses were not so antagonistic as to be irreconcilable. *Lane*, 56 Wn. App. at 298. There was no abuse of discretion in denying Bailey's motion for severance.

3. Redacted Statement

Bailey next contends that Youngblood's redacted statement was unduly prejudicial because it implicated him in the crime. A nontestifying codefendant's confession is inadmissible at a joint trial. even if the jury is instructed to consider the confession only against the codefendant. *Bruton*, 391 U.S. at 137; *State v. St. Pierre*, 111 Wn.2d 105, 111-12, 759P.2d 383 (1988). The statement or confession, however, is admissible and severence is not required so long as "deletion of all references to the moving defendant will eliminate any prejudice to him from the admission of the statement." CrR 4.4(c)(1)(ii). Thus, a nontestifying codefendant's confession is admissible when the confession is redacted to eliminate not only the defendant's name, but also any reference to his or her existence. *Richardson v. Marsh*, 481 U.S. 200, 211, 107 S. Ct. 1702, 95 L. Ed. 2d 176 (1987); *State v. Cotten*, 75 Wn. App. 669, 690-91, 879 P.2d 971 (1994).

Moreover, if the defendant is then implicated by the confession through linkage with other evidence presented by the State, it is not a sufficient reason to either exclude the testimony or sever the trial. *Richardson*, 481 U.S. at 208; *Cotten*, 75 Wn. App. at 691. Severance and/or exclusion of the statement is appropriate only when. the testimony includes "powerfully incriminating extrajudicial statements" of a codefendant. *Bruton,* 391 U.S. at 135-56; *Dent, 123* Wn.2d at 486-87.

Here. Youngblood's confession was redacted such that all references to Bailey were replaced by neutral pronouns such as "someone" or "he or they."[7] Bailey was neither directly named nor inferentially implicated in the redacted statement. Bailey was never expressly linked with the redacted statement during the trial, although a large amount of evidence linked Bailey with many of the occurrences described in the redacted statement. Moreover, the trial court repeatedly instructed the jury not to consider against Bailey in any way evidence presented only against Youngblood, including the redacted statement. Thus, the redacted statement did not prejudice Bailey, and severance was not required under CrR 4.4(c)(1)(ii).

Bailey further asserts that Youngblood's attorney improperly implicated Bailey in the redacted statement during closing arguments. The trial court declined to grant a mistrial. The trial court is in the best position to rule on the prejudicial impact of a statement and its decision is reviewed under the abuse of discretion standard. *State* v. *Weber,* 99 Wn.2d 158, 166, 659 P.2d 1102(1983). Under the circumstances of this case, the trial court did not abuse its discretion in denying Bailey's motion for a mistrial.

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[7] The Supreme Court left open the question of "the admissibility of a confession in which the defendant's name has been replaced with a symbol or neutral pronoun." *Richardson,* 481 U.S. at 211 n.5. But most federal courts have held that "the admission in a joint trial of a codefendant's confession that is redacted to substitute a neutral pronoun or other general word for the name of the complaining defendant does not violate *Bruton* so long as the confession does not compel a direct implication of the complaining defendant." *United States* v. *Enriquez-Estrada,* 999 F.2d 1355, 1359 (9th Cir. 1993); *United States* v. *Miller,* 995 F.2d 865, 867 (8th Cir. 1993).

4. Inadmissible Evidence

Bailey next contends that substantial evidence inadmissible against him was introduced against Youngblood. Bailey neither cites to the record nor provides authority supporting this assertion. We need not review errors that are not supported by argument and citation to legal authority and decline to do so here. *State v. Lord,* 117 Wn.2d 829, 853, 822 P.2d 177 (1991).

B. Racially-Biased Jury

Bailey further contends that his right to be tried by a jury comprised of a representative selection of community members was violated because there were no jurors of African-American descent. Bailey asserts that the case presented issues and evidence that could not be understood by Caucasian jury members. RCW 2.36.080 states:

> (1) It is the policy of this state that all persons selected for jury service be selected at random from a fair cross section of the population of the area served by the court....
>
> . . . .
>
> (3) A citizen shall not be excluded from jury service in this state on account of race, color, religion, sex, national origin, or economic status.

RCW 2.36.080(1), (3).

Under the Sixth and Fourteenth Amendments to the United States Constitution, a criminal defendant has a right to be tried by a jury that is representative of the community. *Taylor* v. *Louisiana,* 419 U.S. 522, 528, 95 S. Ct. 692,42 L. Ed. 2d 690 (1975); *State v. Hilliard,* 89 Wn.2d 430, 440, 573 P.2d 22 (1977). It is required that the source from which juries are selected "reasonably reflects a cross-section of the population." *Taylor,* 419 U.S. at 528; *Hilliard,* 89 Wn.2d at 440. A defendant is not entitled to exact cross-representation in the jury pool, nor need the jury selected for his trial be of any particular composition. *Hilliard,* 89 Wn.2d at 442 (citing *Taylor,* 419 U.S. at 528).

The burden of proving that a selection system is constitutionally invalid rests upon the party challenging the system. *Hilliard,* 89 Wn.2d at 440. To establish a prima facie violation of the fair cross-section requirement, the defendant must show: (1) that the group alleged to be excluded is a "distinctive" group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process. *State* v. *Rupe,* 108 Wn.2d 734, 746, 743 P.2d 210 (1987) (citing *Duren* v. *Missouri,* 439 U.S. 357, 364, 99 S. Ct. 664, 58 L. Ed. 2d (1979)).

At the time of trial, jurors were selected at random from voter registration lists. RCW 2.36.063. The use of voter registration lists for jury selection has been consistently upheld as the best source for compiling a fair cross section of the community. *Hilliard,* 89 Wn.2d at 440-41. Bailey has presented no evidence that African-Americans are underrepresented on the Kitsap County voter registration lists, or that African-Americans were systematically excluded from the jury selection process. Bailey's argument fails.

C. Improper Impeachment of a Witness

Bailey next contends the trial court erred by allowing the State to impeach the testimony of Lovetta Porchia. He asserts that Porchia was only called as a witness so the State could later impeach her testimony with statements she made to Detective Oakley, and that those hearsay statements would not otherwise have been admissible.

A prior inconsistent statement of a witness may be admitted to attack his or her credibility, even if the statement tends to inculpate the defendant. ER 607. Although the State may impeach its own witness, it may not call a witness for the primary purpose of eliciting testimony in order to later impeach the witness with testimony that would otherwise be inadmissible. *State* v. *Lavaris,* 106 Wn.2d 340,344, 721 P.2d 515 (1986) (citing *State* v. *Barber,* 38 Wn. App. 758, 770-71, 689 P.2d 1099 (1984). The motivation in such instances is less to impeach the witness than to introduce hearsay as substantive evidence, contrary to ER 802. *State* v. *Hancock,* 109 Wn.2d 760, 763, 748 P.2d 611 (1988). In other words:

> [I]t would be an abuse of the rule ... in a criminal case, for the prosecution to call a witness that it

> knew would not give it useful evidence, just so it could introduce hearsay evidence against the defendant in the hope that the jury would miss the subtle distinction between impeachment and substantive evidence .... The purpose would not be to impeach the witness but to put in hearsay as substantive evidence against the defendant, which ER 607 does not contemplate or authorize.

Lavaris, 106 Wn.2d at 344-45 (quoting *United States* v. *Webster,* 734 F.2d 1191, 1192 (7th Cir. 1984)).

But the State may impeach a witness by admission of out-of-court statements if the witnesses's testimony on direct examination provided important circumstantial evidence related to the crime, such that it could not be said that the State's "primary purpose" in calling the witness was to introduce inadmissible hearsay evidence. *Hancock,* 109 Wn.2d at 764; *Lavaris,* 106 Wn.2d at 346-47. Moreover, admissibility of the impeachment evidence is left to the discretion of the trial court. *Hancock,* 109 Wn.2d at 766-67.

In the present case, the trial court determined that Porchia was not called for the "primary purpose" of impeaching her testimony through the admission of her otherwise inadmissible statements made to Detective Oakley. Porchia testified that she was a close friend of both Bailey and Youngblood, and that Bailey, Youngblood, and Campbell were at her home the night before and the day of the murders. She testified that Youngblood and Bailey discussed obtaining bullets while she was present. Porchia also testified that Bailey's "trip" to California was a hurried affair, which discredited Bailey's assertion that the trip was a pre-planned family vacation.

Porchia provided circumstantial evidence that supported the State's case. Thus, Bailey has not demonstrated that the State called Porchia as a witness as a "subterfuge" to then impeach her testimony with her statements to Detective Oakley. The trial court did not abuse its discretion in allowing the testimony.

D. Exclusion of Evidence of Other Suspects

Bailey also contends the trial court erred by not allowing evidence which might have implicated a third party in the crime, namely, Leroy Smith. A criminal defendant has a constitutional right to present all relevant and admissible evidence in his defense. *State* v. *Rehak,* 67 Wn. App. 157, 162, 834 P.2d 651 (1992). Evidence is admissible when relevant under ER 401, where the evidence has "any tendency to make the existence of any fact ... of consequence ... more ... or less probable." *State* v. *Clark,* 78 Wn. App. 471, 477, 898 P.2d 854, *review denied,* 128 Wn.2d 1004 (1995).

Before a defendant can introduce evidence connecting another person with the crime charged, a proper foundation must be laid. *State* v. *Jones,* 26 Wn. App. 551,555,614 P.2d 190 (1980). Thus, before such evidence can be admitted, "there must be such proof of connection with the crime, such a train of facts or circumstances as tend clearly to point out someone besides the accused as the guilty party." *State* v. *Mak,* 105 Wn.2d 692, 716, 718 P.2d 407 (1986) (quoting *State* v. *Downs,* 168 Wash. 664,667, 13 P.2d 1 (1932)).

Mere evidence of another party's motive, or even motive coupled with threats, is inadmissible unless coupled with other evidence tending to connect such other person with the actual commission of the crime charged. *Clark,* 78 Wn. App. at 478 (citing *State* v. *Kwan, 174* Wash. 528, 533, 25 P.2d 104 (1933)). Moreover, evidence of another party's whereabouts is inadmissible without foundational circumstances connecting that person with the crime. *Clark,* 78 Wn. App. at 478 (citing *State* v. *Myers,* 12 Wash. 77, 79.40 P.626 (1895)). Admissibility of evidence lies within the sound discretion of the trial court, and its determination will not be reversed absent an abuse of discretion. *Rehak,* 67 Wn. App. at 162.

Bailey presented the following evidence before the trial court as an offer of proof:

(1) Smith's glasses were found near the house where the murders occurred;

(2) Smith formerly belonged to the same gang as the victims and later joined a rival gang;

(3) Smith often sold cocaine;

(4) Smith once had an argument with one of the victims;

(5) Smith fit the general description of a person seen leaving the victim's home at the time of the murder.

The trial court concluded that the evidence presented was not sufficient to establish a proper foundation that Smith was connected with the murders. Specifically, the trial court found that although Bailey offered evidence that a man fitting

Smith's general description may have been observed at the crime scene, and that Smith dealt in drugs and had harsh words for the victims, Bailey did not offer proof that Smith was at the scene of the crime or even possessed a firearm with which to commit the crimes.

The evidence offered by Bailey related to Smith established only: (1) a motive shared by several other parties; and (2) alleged presence at the crime scene. A proper showing of admissibility is not made if the defendant only shows that it was possible for a third party to have committed the crime. *Rehak,* 67 Wn. App. at 163. There must be some showing of not only ability, but also some step taken by the third party that indicates an intent to act on that ability. *Rehak,* 67 Wn. App. at 163. Therefore, the trial court did not abuse its discretion in holding that the evidence relating to Smith was inadmissible.

E. Consecutive Sentences

Bailey raises the same "concurrent rather than consecutive sentences for murder and conspiracy" argument as Youngblood. We have already addressed this issue.

F. Motion for a New Trial

In his supplemental brief, Bailey contends the trial court erred in denying his motion for a new trial.

1. Disclosure of Smith's Location

Bailey asserts the trial court should have granted a new trial under CrR 7.6(a)(2) because the State failed to disclose the known whereabouts of

Smith, and that the State knew the defense was going to allege that Smith was the actual perpetrator of the crime. Bailey argues that had the codefendants been informed of Smith's location, they would have interviewed him and that information would have been enough to establish the evidentiary foundation required in *Mak,* 105 Wn.2d at 716, to admit evidence of Smith's alleged involvement in the crime.

The State is obligated to disclose all evidence that is favorable to the defendant such that it tends to negate guilt as to the charged offense. CrR 4.7(3): *Brady v. Maryland,* 373 U.S. 85, 87, 83 S. Ct. 1194, 101. Ed. 2d 215 (1963). Under *Brady,* the State is required to disclose all evidence that is: (1) favorable to the defendant; and (2) "material" to determining guilt or punishment. *United States v. Bagley,* 473 U.S. 667, 674, 105 S. Ct. 3375, 87 1. Ed. 2d 481 *(1985); State v. Garcia,* 45 Wn. App. 132, 139, 724 P.2d 412 (1986). A constitutional error occurs, and a conviction must be reversed, only if the evidence not disclosed by the State is "material," such that there is a reasonable probability that the result of the trial would have been different had the evidence been disclosed. *Bagley,* 473 U.S. at 678: *State v. Benn,* 120 Wn.2d 631, 649, 845 P.2d 289 (1993). A "reasonable probability" is one sufficient to undermine confidence in the outcome. *Bagley,* 473 U.S. at 678; *Benn,* 120 Wn.2d at 631.

The trial court concluded that Bailey failed to prove that disclosure of Smith's location would have been "material," for "[e]vidence presented suggesting others might also have been involved in the crime does not exculpate Bailey or aid him in his quest for a new trial." We have already addressed this issue and do not repeat the analysis here.

Bailey has presented only unsupported assertions that "if" Smith had been interviewed, then Smith would have provided information which would have either exonerated Bailey or provided the necessary foundation to admit the evidence. Smith already submitted an affidavit in this case, where he denied any connection with the murder. Bailey has not shown that being able to interview Smith would have produced a "material" difference at trial.

2. Spates's Declaration

Bailey also asserts the trial court erred in excluding the tape-recorded statement provided by Teresa Spates, which detailed the alleged statements and acts of Michael Oliver on the night of the murders. The trial court determined that the statement was not admissible and, more importantly, would not change the result of the trial. Bailey argues the trial court erred in holding that the newly produced declaration did not mandate a vacation of his conviction.

A new trial may be granted for "newly discovered evidence" under CrR 7.6(a)(3) if the moving party demonstrates that the evidence: (1) will probably change the result of the trial; (2) was discovered since the trial; (3) could not have been discovered before trial by the exercise of due diligence; (4) is material; and (5) is not merely cumulative or impeaching. *State* v. *Williams*, 96 Wn.2d 215, 222-23, 634 P.2d 868 (1981). The absence of anyone of these five factors is grounds for the denial of a new trial. *State* v. *Franks*, 74 Wn.2d

413, 417-18, 445 P.2d 200 (1968).

The trial court concluded that Spates's statement did not meet elements (1), (4), and (5) of the *Williams* test. The decision of the trial court on a motion for a new trial based upon newly discovered evidence will not be disturbed on appeal absent an abuse of discretion. *Williams*, 96 Wn.2d at 221.

Bailey asserts the trial court erred by excluding Spates's statement because it materially affected the determination of guilt. He argues that the hearsay statements were admissible under two exceptions to the hearsay rule: (1) excited utterance, ER 803(a)(2); and (2) statement against interest, ER 804(b)(3). But the only relevant question in this case is whether the trial court abused its discretion in holding that Spates's statement were not sufficient to justify a new trial.

In deciding if newly discovered evidence would probably change the result of the first trial, the trial court must evaluate the credibility, significance, and cogency of the new evidence. *State v. Hutcheson*, 62 Wn. App. 282, 297, 813 P.2d 1283 (1991) (citing *State v. Peele, 67* Wn.2d 724,730-31,409 P.2d 663 (1966)). The trial court determined that Spates's statement was not material, for nothing in the statement, including Oliver's hearsay statements, even remotely exonerated Bailey. The trial court determined that Oliver's statements established that the victims may have been killed by a group of people, but the statements did not establish that Bailey was not a member of that group. Thus, the trial court found that there was no reasonable probability that Spates's statement would have changed the outcome of Bailey's trial. Accordingly, the trial court did not abuse its discretion in refusing to grant a new trial. Spates's statement implicates Oliver as a possible co-participant or witness to the crime, but Spates's statement does not provide any information that would have materially affected Bailey's conviction.[8]

Affirmed.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

HOUGHTON, C.J.

We concur:

/s/ Morgan, J.

Morgan, J.

/s/ Seinfeld, J.

Seinfeld. J.

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[8] In its brief, the State argues that the trial court erred in even considering Spates's statement, for Spates never attested to the truthfulness of the statement. Because the trial court properly determined that the statement was not material to the case and denied the motion for a new trial, that issue has not been addressed here.